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Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL., PETITIONERS,

vs.

CALVERT DISTILLERS CORPORATION

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

PETITION FOR CERTIORARI FILED DECEMBER 8, 1950.

CERTIORARI GRANTED FEBRUARY 26, 1951.

INDEX

	PAGE
Bill of Complaint	2
Exhibit "A"—Form of Fair Trade Contract	14
Affidavit of Henry W. McGuire, dated 11/23/49	17
Answer of Defendants to Bill of Complaint	19
Motion of Defendants to Dismiss	24
TRANSCRIPT OF PROCEEDINGS:	
Evidence for Defendants:	
Testimony of Anthony Bologna	26
Harold J. Bevan	37
Henry G. McGuire	44
Fred Scharfenstein	62
John Schwegmann	66
Evidence for Plaintiff:	
Testimony of Marvin Levin	74
Exhibit "B"—Excerpt of Letter Calvert Distillers Corp., addressed to "Dear Mr. Retailer", dated 11/- 14/49	75
Judgment, entered 12/20/49	80
Findings of Fact and Conclusions of Law	83
Notice of Appeal	91
Joint Stipulation of Counsel as to Contents of Record on Appeal	92
Appellants' Statement of Points on Appeal	97
Clerk's Certificate	98

INDEX

ii

	Page
Proceedings in United States Court of Appeals, Fifth Circuit	99
Joint motion and order to consolidate cause for argument	99
Minute entry of argument and submission	101
Opinion, Hutcheson, C. J.	102
Dissenting opinion, Russell, J.	109
Judgment	113
Petition for rehearing and supporting brief	114
Order denying petition for rehearing	122
Clerk's certificate (omitted in printing)	122
Order allowing certiorari	122

UNITED STATES OF AMERICA.
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA.

No. 2607 Civil Action.

CALVERT DISTILLERS CORPORATION,

versus

SCHWEGMANN BROTHERS, ET AL.

Appearances:

**Messrs. Wisdom & Stone, John Minor Wisdom, Esq.,
Saul Stone, Esq., Paul O. H. Pigman, Esq., Attorneys
for Defendant-Appellant.**

**Messrs. Monroe & Lemann, Walter J. Suthon, Jr., Esq.,
Robert G. Polack, Esq., Attorneys for Plaintiff-Appellee.**

**APPEAL from the District Court of the United States for
the Eastern District of Louisiana, to the United States
Court of Appeals for the Fifth Circuit, returnable
within forty (40) days from the 17th day of January,
1950, at the City of New Orleans, Louisiana.**

**Extension of time granted by the Honorable United
States District Court, Eastern District of Louisiana, bringing
the return day up to and including April 4th, 1950.**

BILL OF COMPLAINT.

Filed Nov. 25, 1949.

(Number and Title Omitted.)

To the Honorable the United States District Court for the
Eastern District of Louisiana, New Orleans Division:

Calvert Distillers Corporation, a corporation organized and established under the laws of the State of Maryland, brings this bill of complaint against Schwegmann Brothers, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and said John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, individually, all of the full age of majority and domiciled in the City of New Orleans, State of Louisiana, and for cause of action plaintiff avers that:

I.

Plaintiff now is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Maryland, and a citizen and resident of that State, having its domicile and principal place of business at Relay, in the State of Maryland.

II.

Defendant, Schwegmann Brothers, is, and at all times hereinafter mentioned was, a commercial partnership doing business in the City of New Orleans, State of Louisiana, and a citizen and resident of that State, composed of defendants, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, all of whom are citizens and residents

of that State, having their domicile and principal place of business in the City of New Orleans, Parish of Orleans, State of Louisiana, and within the Eastern District of Louisiana, in which place and in which district among others the acts herein complained of have been done by said defendants.

III.

The jurisdiction of this Court is based on diversity of citizenship, the matter in dispute and the amount in controversy, exclusive of interest and costs, being in excess of Three Thousand Dollars (\$3,000.00), and the object of this suit is to obtain an abatement of defendants' acts herein complained of and to enjoin and restrain recurring and continuing trespasses by defendants upon plaintiff's rights of property, its business, good will, trade marks, names, brands and labels identifying its commodities, which are all of a value and amount largely in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

IV.

Plaintiff, Calvert Distillers Corporation, is a wholly owned subsidiary of The Calvert Distilling Company, also a Maryland corporation, which parent company manufactures "Lord Calvert", "Calvert Reserve", and "Calvert Special" blended whiskies, and "Calvert Distilled London Dry Gin", and owns the trade mark, "Calvert", which trade mark or trade name is registered in the United States Patent Office in the name of said The Calvert Distilling Company.

Plaintiff, Calvert Distillers Corporation, is the exclusive distributor for the State of Louisiana of the brands of

whiskey and gin aforesaid, and also "Carstairs White Seal" blended whiskey, manufactured by an affiliate, Carstairs Bros. Distilling Co., Inc., a Maryland corporation, which owns the trade name, "Carstairs".

Plaintiff, Calvert Distillers Corporation, has been specifically authorized by each and all of said producers and owners of the aforesaid trade names and brands to establish and enforce minimum resale and retail prices in Louisiana under the Louisiana Fair Trade law of the above-mentioned trade-marked and named beverages.

Said beverage products are sold in Louisiana only to wholesalers who in turn sell them to retailers for resale to the consuming public. All such products purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce, shipments being made from and title passing at a point outside of the State of Louisiana. All orders for merchandise by its Louisiana customers are subject to acceptance by plaintiff's executive office in New York.

V.

Plaintiff for several years past has sold or distributed, and now sells and distributes, within the State of Louisiana, the aforesaid whiskeys and liquors which bear, or the labels or contents of which bear, the aforesaid trade marks, brands or names. Said products or commodities have been and are in fair and open competition with products or commodities of the same general class produced by others. The products or commodities distributed by plaintiff, and bearing its aforesaid trade mark, brands or names, are, and for several years past have been, sold at retail through liquor stores and other establishments.

dealing in liquors throughout the State of Louisiana, and elsewhere in the United States.

VI.

By advertising and otherwise, "Calvert" products, identified as aforesaid, for several years past have been and now are well recognized and established commodities, both nationally and in the State of Louisiana, and "Calvert" products, so identified, now enjoy, and for several years past have enjoyed, a good reputation among dealers, retailers and consumers. Plaintiff has established a valuable good will and has expended large sums of money in the creation and development thereof, and at all times has endeavored to so market its commodities or products that they should be offered for sale within the State of Louisiana at reasonable prices, and to induce retailers to handle its products or commodities, plaintiff has endeavored to create a public demand for its products or commodities at prices which will yield a fair profit to retailers handling them.

VII.

Several years ago there developed in the liquor trade a practice of cutting prices on advertised products or commodities well known to the public and sold under distinctive trade marks, brands and names. Such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said products or commodities, as so-called "leaders" for the purpose of creating the impression that their goods, of which the prices were not well known, were sold at corresponding reductions and that all articles dealt in by a particular retail dealer engaged in price cutting were sold by him at less than

they could be obtained elsewhere, and for the purpose of attracting customers to such stores and away from other stores. The stores at which such practices were prevalent became known as "cut rate stores". Such practice of cutting well known and established prices engendered a condition by which other retail dealers were forced to meet the cut prices advertised by their competitors. One cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade marks, brands and names with established prices were offered at prices cut to a point which yielded no profit, and in many instances represented actual loss. Said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their consequent refusal to handle or to stock the same. As a further result of said price cutting, the producer or owner of such identified articles whose goods had been handled in this manner through no fault of his own, was deprived of a market and facilities for distribution and his business and good will seriously interfered with, and in many instances destroyed.

VIII.

The situation above set forth was particularly true in the State of Louisiana, especially with respect to whiskies and liquors, and had extended to other lines of merchandise. To remedy this evil and to safeguard the public against the creation and perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented, the legislature of Louisiana passed Act No. 13 of 1936, known as the "Louisiana Fair Trade Act". And, by amendment to the Sherman Anti-Trust Act, August 17, 1937, c. 690, Title VIII S 1, 50 Stat. (U. S. C. A. Title 15, S 1, Act 1937), it was provided:

"Provided, that nothing herein contained shall render illegal, contracts or agreements, prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented; Provided, further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other."

IX.

Pursuant to the public policy of the State of Louisiana, evidenced by the said "Louisiana Fair Trade Act" and to the provisions thereof, and in order to protect itself, together with wholesalers, retailers and the consuming public against the injurious and uneconomic practices recognized by the said "Louisiana Fair Trade Act", and particularly against the price cutting hereinabove set forth, plaintiff adopted a system of doing business which consisted of entering into a standard form of contract with

retail dealers in the State of Louisiana, involving and concerning plaintiff's products and commodities, bearing plaintiff's distinctive trade marks, brands, names and labels, and obligated said dealers to sell plaintiff's said products and commodities only to consumers at specified prices. Plaintiff annexes hereto as part hereof said standard form of contract, marked Exhibit "A", being a true and correct copy of the form of contract above referred to. On or about April 1, 1948, plaintiff entered into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". Plaintiff, in addition, on or about November 12, 1949, entered into signed contracts with five retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". On or about November 14, 1949, plaintiff sent or caused to be sent, through its New York office and Gulf States Beverage Journal of Coral Gables, Florida, by first-class United States mail with sufficient postage attached for their transmission to all of the retail liquor dealers throughout the State of Louisiana, including the defendants herein and other dealers in New Orleans, Louisiana, a letter in which was enclosed a schedule of its current minimum prices of products distributed by it in Louisiana. Said letter called attention to the fact that a number of fair trade contracts were then in effect in Louisiana which made the resale prices shown on the enclosed list binding on the other retailers regardless of whether they had signed the contract with plaintiff or not. Plaintiff annexes hereto as part hereof a copy of said letter of November 14, 1949, and its said schedule of prices which accompanied said letter, which are clipped together and marked Exhibit "B".

X.

Plaintiff is informed and believes, and so believing, avers that notwithstanding the existence of its fair trade agreements with authorized retail liquor dealers in the State of Louisiana, and full knowledge thereof by the defendants, defendants have sold at retail to the consuming public, and continue to so sell, the commodities or products bearing the trade marks, names, brands and labels of plaintiff at prices below the minimum retail prices set forth in Exhibit "B". Defendants have, therefore, violated said "Louisiana Fair Trade Act" (Act No. 13 of the Louisiana Legislature of 1936), defendants having actual notice and knowledge of the existence of numerous such contracts between plaintiff and other Louisiana retail liquor dealers who observe said minimum retail resale schedules and who distribute plaintiff's products and commodities identified as aforesaid. Defendants have also had actual notice and knowledge of the minimum retail resale price of plaintiff's products specified in the attached documents marked Exhibit "A" and Exhibit "B" which have been and are now in force.

XI.

Subsequent to the aforesaid notices and prior to the commencement of this action, defendants, as plaintiff is informed and believes and so believing avers, with full knowledge of the existence of plaintiff's contracts, and of plaintiff's minimum retail resale price schedule, and with the purpose and intention of interfering with and destroying the effects thereof, and in violation of the provisions of the "Louisiana Fair Trade Act", have knowingly and wilfully offered for sale and sold at retail, and are now so doing, certain of the products and commodities of plain-

tiff bearing the name, trade marks, labels, brands of plaintiff and mentioned and described in the exhibits hereto annexed, particularly the whiskey distributed by plaintiff and known as "Calvert Reserve", at less than the minimum retail price stipulated in the contract and price list hereto annexed, and marked Exhibit "A" and Exhibit "B". Defendants have always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers. Plaintiff, on information and belief, avers the following specific instances of such conduct on the part of defendants:

(1) Defendants did, on or about 10:45 o'clock A. M., Friday, November 18, 1949, sell a bottle of "Calvert Reserve" whiskey, containing one-fifth of a gallon, at the cut price of \$3.25, plus sales tax of 10¢, or a total price of \$3.35, when the price of said one-fifth of a gallon of "Calvert Reserve" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was \$4.24, plus sales tax of 13¢, or a total of \$4.37.

(2) Defendants did, on or about 10:55 o'clock A. M., Friday, November 18, 1949, sell a bottle of "Calvert Reserve" whiskey, containing one-fifth of a gallon, at the cut price of \$3.25, plus sales tax of 10¢, or a total price of \$3.35, when the price of said one-fifth of a gallon of "Calvert Reserve" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was \$4.24, plus sales tax of 13¢, or a total of \$4.37.

XII.

Said wilful acts of the defendants are contrary to the provisions and spirit of the "Louisiana Fair Trade Act",

and constitute unfair competition as to plaintiff, and all retail liquor dealers within the State of Louisiana, including those under contract with plaintiff. Said wilful acts of defendants have induced, coerced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff. In addition thereto, a further consequence of defendants' aforesaid wilful acts is that the buying public, including customers of all retail liquor dealers in the State of Louisiana, are misled and induced thereby to believe that plaintiff's products or commodities sold by defendants are not worth the prices at which they are nationally advertised and sold, pursuant to plaintiff's minimum retail resale price schedules. Retailers other than the defendants cannot profitably market plaintiff's commodities or products at the prices at which said products or commodities are advertised and sold by defendants. A continuation of such acts by defendants will produce great and irreparable injury to plaintiff. It is impossible to ascertain the pecuniary loss which plaintiff has already suffered, and will suffer if the practices of defendants are permitted to continue. A continuance of such acts by defendants tends to result in irreparable loss of sales to plaintiff and the destruction of plaintiff's business and the good will pertaining thereto. Pecuniary compensation would not afford adequate relief to plaintiff, and it is necessary that defendants be restrained from continuing their wilful acts in derogation and violation of said "Louisiana Fair Trade Act" and of the rights of plaintiff thereunder as aforesaid, to prevent a multiplicity of suits. The wrongs complained of as above set forth imminently imperil and immediately threaten devastation of plaintiff's business, and destruction of plaintiff's good will, and multiple breaches, violations and cancellations of its said contracts with other retail liquor dealers throughout the State of Louisiana, and plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that, after due hearing and upon presentation to the Court by plaintiff of such bond as the Court may require and approve, the Court grant a preliminary writ of injunction enjoining defendants, Schwegmann Brothers, a commercial partnership, and John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, the individuals composing said partnership, their officers, agents, servants and employees, and all persons acting in aid or in conjunction with them or any of them, pending final hearing or sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale, selling, or offering for sale, any of the products or commodities of plaintiff, Calvert Distillers Corporation, bearing the names, trade marks, labels or brands of plaintiff, which said defendant, Schwegmann Brothers, now has or which it may hereafter acquire, and mentioned and described in the contract, forms and schedules annexed and attached hereto, and marked Exhibit "A" and Exhibit "B", at prices less than those set opposite each of said products in said schedules as mentioned and described therein, or at prices less than those which may be shown in any future minimum retail prices schedules hereafter issued by plaintiff in connection with its contracts with other dealers; and from making any rebates, refunds, discounts or concessions of any kind or character for the purpose of or which will result in decreasing the said stipulated resale scheduled prices, except that in case defendants are (a) closing out their stock for the purpose of discontinuing delivering any such commodity, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court; and that upon final hearing, said injunction be made permanent and perpetual.

Plaintiff further prays for such other, further and different relief of any and every sort as to this Court may seem just, equitable and proper in the premises, together with costs and disbursements of this suit.

(S.) MONROE & LEMANN,

(S.) - WALTER J. SUTHON, JR.,

(S.) ROBERT G. POLACK,

Solicitors for Plaintiff.

1424 Whitney Building,
New Orleans, Louisiana.

State of Louisiana,
Parish of Orleans.

Robert G. Polack, being duly sworn, deposes and says:

That he is an attorney at law and one of the solicitors for the plaintiff herein; that he has read the foregoing bill of complaint, and knows the contents thereof; that plaintiff is a foreign corporation and that none of its officers are within the State of Louisiana; that all of the allegations of fact contained in said bill of complaint are true and correct to the best of affiant's knowledge, information and belief; and that as to such matters as are stated on information and belief, affiant believes them to be true.

(S.) ROBERT G. POLACK.

Sworn to and subscribed before me at New Orleans, Louisiana, this 23 day of November, 1949.

WATTS K. LEVERICH,

Notary Public.

EXHIBIT "A".

Calvert Distillers Corporation.

This Agreement, made this day of , 194 . . . , between Calvert Distillers Corporation, a corporation with an office and place of business at 4/ 5 Lexington Avenue, New York City, N. Y. (hereinafter called "Distributor"), and , of Louisiana (hereinafter called "Retailer"),

Witnesseth:

Whereas, Distributor is engaged in the business of distributing certain alcoholic beverages which are owned by Distributor and the labels or containers of which bear the trade-marks, brands and/or name of Distributor, or the trade-marks, brands and/or name of the producer thereof, and

Whereas, in each case in which Distributor does not own any trade-mark, brand or name used in connection with any such beverage, Distributor has been specifically authorized by the producer owning such trade-mark, brand or name to establish a minimum resale price for such beverage pursuant to the provisions of the Fair Trade Act of the State of Louisiana, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced or distributed by others, and

Whereas, Distributor and Retailer desire to avail themselves and the public of the benefits of the said Fair Trade Act, and to avoid having such trade-mark and branded

articles made the subject of injurious and uneconomic practices, and to avoid the depreciation of or damage to said trade-marks, brands or names through such practice,

Now Therefore, the parties hereto agree as follows:

First: Retailer will not sell, advertise, or offer for sale within the State of Louisiana any alcoholic beverage which Retailer has purchased, or now has on hand, or may hereafter purchase, and which (a) bears the trade-mark, brand or name of Distributor, or (b) is distributed by Distributor and bears the trade-mark, brand or name of the producer of such beverage, at less than the minimum price for such beverage stipulated from time to time by Distributor. Retailer further agrees that he will not offer or give any article of value in connection with the sale of such beverage, or sell or offer for sale any such beverage in combination with any other commodity, or make any refunds, discounts or concessions of any kind, whether by the giving of coupons or otherwise, for the purpose of, or which will result in evading the minimum price restrictions imposed under this contract.

Second: In the event (a) of closing out of Retailer's stock for the purpose of discontinuing dealing in any alcoholic beverage to which this contract is applicable, or (b) that any such beverage in Retailer's hands is damaged, defaced, or deteriorated in quality, or (c) that Retailer has on hand any of said beverages after this agreement has been terminated or canceled for any reason, Retailer, before offering the beverage or beverages in question for sale at a price or prices less than the minimum prices fixed therefore pursuant to this contract, shall first give Distributor reasonable notice in writing and an opportunity to purchase such beverage or beverages at the original in-

voice price at which Retail purchased such beverage or beverages.

Third: The minimum prices of said beverages in sales by Retailer to consumers shall be in accordance with written schedules furnished from time to time by Distributor to Retailer, which schedules shall constitute a part of this contract. Distributor reserves the right at any time, and from time to time, by giving written notice to Retailer, to change the minimum prices specified in said schedules, to eliminate one or more beverages from the operation of this contract, and (subject to the provisions of the said Fair Trade Act) to extend the operation of this contract to one or more additional beverages. Said notice may be given by delivering the same to Retailer in person, or to any employee of Retailer at Retailer's principal place of business, or by mailing the same by registered or ordinary mail addressed to Retailer at Retailer's place of business, and shall be effective upon the expiration of five (5) days after the delivery or mailing thereof, as the case may be, Sundays and holidays included. The schedule which shall have last become effective shall govern the minimum prices for said beverages at the time each particular sale, advertisement, or offer of sale is made.

Fourth: Inasmuch as it would be impracticable or extremely difficult to fix the damage which may be sustained by Distributor by reason of a breach of this contract by Retailer, it is agreed that the Retailer shall pay to Distributor, as liquidated damages, the sum of Fifty (\$50) Dollars for each breach of this contract. It is further agreed that Distributor, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by Retailer.

Fifth: This contract shall expire in one year from the date hereof, but shall be renewed from year to year unless at each termination date the parties hereto indicate in writing their desire not to have the contract renewed. Distributor reserves the right to cancel this agreement on twenty-four hours written notice to Retailer, which may be given in the manner prescribed in paragraph "Third". Neither termination nor cancellation shall affect any right which shall have accrued to either of the parties hereto under this contract or the said Fair Trade Act prior to such termination or cancellation, or affect the application to Retailer of the provisions of the said Fair Trade Act relating to non-contracting parties.

This contract supersedes any previous contracts, based on the said Fair Trade Act of Louisiana between the parties hereto.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

**CALVERT DISTILLERS
CORPORATION,
Distributor.**

By

Retailer.

By

State of Louisiana,
Parish of Orleans.

Henry W. McGuire, being duly sworn, deposes and says:

That he resides in the City of New Orleans; that Calvert Distillers Corporation did, on or about April 1, 1948, enter

into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case marked Exhibit "A", and providing for the maintenance of minimum retail price schedules; that Calvert Distillers Corporation has, on or about November 12, 1949, entered into signed contracts with five retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case and marked Exhibit "A", and providing for the maintenance of minimum retail price schedules; that he caused to be mailed through the New York office of Calvert Distillers Corporation and Gulf States Beverage Journal of Coral Gables, Florida, by United States mail, postage prepaid, on or about November 14, 1949, a copy of the notice of the minimum retail price schedules on products of Calvert Distillers Corporation, identical with the form attached to the bill of complaint in this case, and marked Exhibit "B"; that a copy of said notice was addressed and mailed to Schwegmann Brothers Super Market at 2222 St. Claude Avenue, New Orleans, Louisiana; that when Calvert Distillers Corporation caused to be mailed a copy of said Exhibit "B" to Schwegmann Brothers Super Market, it also caused copies thereof to be mailed simultaneously to all other retail liquor establishments in Louisiana.

(Sgd.) HENRY W. McGUIRE.

Sworn to and subscribed before me at New Orleans, Louisiana, this 23rd day of November, 1949.

(Sgd.) ROBERT G. POLACK,
Notary Public.

ANSWER TO COMPLAINT.

Filed Dec. 12, 1949.

(Number & Title Omitted.)

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

First Defense.

The complaint fails to state a claim upon which relief can be granted. The plaintiff's course of conduct in using contracts with certain Louisiana retailers as a basis for fixing the prices of non-contracting Louisiana retailers violates the Sherman Anti-Trust Act, as amended by the Miller-Tydings Act. Defendants' course of conduct in attempting to fix resale prices of non-contracting retailers in Louisiana is an integral part of an integrated price-fixing scheme of transactions affecting interstate commerce dependent for its success upon activity which affects interstate commerce.

Second Defense.

The complaint fails to state a claim upon which relief can be granted, for the following reasons:

(1) The contracts executed on or about April 1, 1948 expired one year from the date of execution. Such contracts could not be renewed under the renewal clause, because of Regulation 8 of the Louisiana Board of Alcoholic Beverage Control. Regulation 8 (effective November 9, 1948; rescinded, effective November 12, 1949) prohibits

the execution of fair trade contracts "affecting the prices of liquor in the State of Louisiana". A copy of Regulation 8 and a copy of the Board's order rescinding the regulation are attached hereto, as Defendants' Exhibits "A" and "B".

(2) The defendants' sales complained of in this action were of merchandise purchased prior to receipt of notice of the contracts referred to as executed "on or about November 12, 1949".

Third Defense.

The complainant fails to state a claim upon which relief can be granted, for the following reasons:

(1) Implicit in Act 13 of 1936 is the mandate that a producer, distributor, or wholesaler availing itself of this extraordinary statute must maintain a uniform price policy. Plaintiff has not maintained a uniform price policy. In the enforcement of its prices, plaintiff winks at price-cutting of certain dealers, especially those who cooperated with plaintiff in sponsoring and defending the price-fixing features of Act 360 of 1948. Plaintiff discriminates against other dealers, and particularly against defendants who attacked the price-fixing features of Act 360 of 1948.

(2) Plaintiff comes into Court, seeking equitable relief, with unclean hands in that it has enforced its resale prices in an arbitrary and discriminatory manner.

Fourth Defense.

The complaint fails to state a claim upon which relief can be granted. The acknowledged basis for holding non-

contracting parties to prices fixed in a so-called fair trade contract is to protect the good will incident to ownership of a trade-mark. The contracts upon which plaintiff relies in this action were not entered into by the producer or by the owner of the trade-mark in question, but by a distributor, a separate corporate entity having no ownership of the trade-mark. The contracts relied upon here do not, therefore, come within the contemplated scope of Act 13 of 1936 or of the Miller-Tydings Amendment to the Sherman Anti-Trust Act.

I.

Defendants, for lack of information, deny the allegations in Paragraph I of the complaint and call for strict proof, including proof of the fact that complainant is qualified to do business in the State of Louisiana.

II.

Defendants admit the allegations in Paragraph II of the complaint, but deny that the acts complained of are in violation of existing law.

III.

Defendants deny that this Court has jurisdiction based on diversity of citizenship. On the contrary, defendants aver that indispensable party plaintiffs in this suit are Louisiana citizens. The validity of the contracts relied upon here is at issue; all the contracting parties are therefore indispensable parties.

IV.

Defendants deny the allegations of Paragraph IV of the complaint, for lack of information, except that they admit

that all of the products mentioned therein that are purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce.

V.

Defendants deny, for lack of information, the allegations in Paragraph V of the complaint and call for strict proof of the fact that the products and commodities therein mentioned are in fair and open competition with products and commodities of the same general class produced by others.

VI.

The allegations of Paragraph VI require no admission or denial by defendants.

VII.

Defendants deny the allegations in Paragraph VII of the complaint, especially insofar as Louisiana is concerned.

VIII.

Defendants deny the allegations in Paragraph VIII of the complaint, insofar as Louisiana is concerned, except they admit that the laws referred to were enacted.

IX.

Defendants deny the allegations in Paragraph IX that the Louisiana Fair Trade Law was enacted to protect the consuming public against injurious and uneconomic practices. On the contrary, defendants avers that the so-called

Fair Trade Law was pressured through the legislature by a few well-organized pressure groups of wholesalers and retailers for their own advantage; solely for the profit of inefficient and marginal merchants who could not survive in a competitive market, to the detriment of the public and of the efficient merchant who could prosper in a free and competitive market.

Defendants deny the validity of the contracts mentioned in Paragraph IX of the complaint. Defendants admit the receipt of the letter from plaintiff's New York office, dated November 14.

X.

Defendants deny the allegations of Paragraph X of the complaint, and particularly that they violated any existing law.

XI.

Defendants deny the allegations of Paragraph XI except with respect to the product known as Calvert Reserve, which it admits it sold at the prices set forth in subparagraphs 1, 2, 3, and 4 of Paragraph IX of the complaint.

XII.

Defendants deny the statement made in Paragraph XII, particularly that defendants' acts have induced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff.

Defendants deny that the buying public is misled by virtue of reduced prices and allege on the contrary that

such reduced prices benefit the public. Defendants deny that retailers cannot profitably market plaintiff's commodities except at the price fixed by plaintiff. Defendants deny that the sale of plaintiff's product at a price below the established price will cause a destruction of plaintiff's business, and defendants deny that plaintiff is entitled to injunctive relief.

Wherefore, defendants pray that the complaint herein be dismissed at plaintiff's cost.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendants.

By SAUL STONE.

312 Whitney Building,
New Orleans, Louisiana.

MOTION TO DISMISS.

Filed Dec. 13, 1949.

(Number & Title Omitted.)

To the Honorable The United States District Court for the
Eastern District of Louisiana, New Orleans Division:

The defendant moves the Court to dismiss the complaint for the following reasons:

1. The complaint fails to state a claim against defendant upon which relief can be granted. The contracts relied upon by plaintiff are null and void under the law of

Louisiana in that the contracts lack mutuality for the reason that the plaintiff has incurred no obligation thereunder. In the alternative, if an obligation on the part of the plaintiff inferentially exists, such obligation is subject to purely potestative conditions.

2. Plaintiff has failed to join indispensable parties. Plaintiff predicates its complaint on contracts, the validity of which are at issue. The contracting dealers are therefore indispensable parties to the action.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendants,
By JOHN MINOR WISDOM.

312 Whitney Building,
New Orleans, Louisiana.

United States District Court, Eastern District
Of Louisiana.

Calvert Distillers Corporation,

Vs. No. 2607, C. A.

Schwegmann Brothers, Et Al.,

Proceedings had in open Court before Honorable
J. Skelly Wright, Judge, United States District Court
for the Eastern District of Louisiana, in the above

entitled and numbered cause, on December 13, 1949, at New Orleans, Louisiana.

Appearances:

Messrs. Wisdom & Stone, (John Minor Wisdom, Saul Stone, Esqs.) Attorneys for Plaintiff.

Messrs. Monroe & Lemann, (Walter J. Suthon, Jr., and Robert G. Polack, Esqs.) Attorneys for Plaintiff.

ANTHONY BOLOGNA, witness, being duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Your name is Anthony Bologna?

A. Yes, sir.

Q. What is your business?

A. Wholesale liquor dealer.

Q. Where are you located?

A. 514 North Claiborne Avenue.

Q. In New Orleans?

A. In New Orleans, yes.

Q. Are you now a wholesaler for Calvert?

A. No, sir.

Q. Were you ever a wholesaler for Calvert Distillers Corporation, Mr. Bologna?

A. For twelve years.

Q. When was your relationship with Calvert terminated?

A. I would say about three months ago.

Q. You were a wholesale distributor for twelve years prior to three months ago?

A. Right.

By Mr. Stone:

Q. Prior to the effective date of Act 360 you were the only Calvert distributor in this area?

A. That is not correct.

Q. Who else were distributors?

A. McKesson & Robbins, Inc.

Q. You were both handling Calvert at that time?

A. Correct.

Q. From whom did you purchase the Calvert that you sold to the retailers?

A. From Calvert Distillers.

Q. Did you as a wholesaler enter into any fair trade contracts with retailers with respect to Calvert?

A. As a whoelsaler I didn't enter into any.

The Court:

What is the effective date of Act 360?

July 28, 1948.

Q. Are you familiar with the general policy of Calvert that prevailed in New Orleans with respect to resale price maintenance prior to Act 360 and after April 1, 1948?

Mr. Suthon:

That calls for the opinion of the witness, or a conclusion of the witness rather than any facts.

The Court:

Overruled. Let him testify whether or not he is familiar.

A. If my memory serves me right, I don't recall a contract from the wholesaler to the retailer, but I think there was a contract from the distillers to the retailers.

By Mr. Stone:

Q. Didn't you tell me when I talked to you on the telephone yesterday that you did not know of any fair trade contracts in effect with respect to Calvert before Act 360?

A. I told you I didn't know whether there were or not, but I would look it over and see whether there was. I do recall there was a contract from the distiller to the retailer, but I don't recall any contract from the wholesaler to the retailer. I don't recall whether the wholesaler to the retailer, or the distiller to the retailer.

Q. Has there ever been any contract from the wholesaler to the retailer in whiskey maintenance prices—

A. I don't know. You mean between the retailer and the wholesaler?

A. Yes.

A. I don't know if any.

Q. Are you familiar with the prices that prevailed on Calvert between April, 1948 and July, 1948, when Act 360 became effective?

A. What do you mean, was I familiar?

Q. Do you know what the retail prices that Calvert had to be sold for under the fair deal contracts between April 1, 1948 and July, 1948 when Act 360 became effective?

A. I believe it was \$4.24.

Q. And at that time when you were selling Calvert to the retailers you were giving what the trade commonly called "deals"?

A. During what period?

Q. The three months before Act 360 went into effect.

A. Yes, we had deals.

Q. Will you explain to the Court what deals mean in the whiskey trade?

A. Quantity deals, buy twenty cases and get a discount of \$2.00 or \$3.00, whatever it may be, per case.

Q. When you sold those deals prior to Act 360, wouldn't that mean that the retailer would necessarily sell, or be in position to sell his products cheaper?

Objection: Mr. Suthon:

We object. There is no relevancy, and calling for the conclusion of the witness.

(Colloquy).

The Court:

I do not follow the testimony that this man was in any contract with Calvert, nothing established to show there was a contract with this witness.

Mr. Stone:

He was the wholesaler for Calvert in this area, and distributed the whiskey handled in this area. As a matter of fact, Calvert Distillers could not sell to the retailers. He and McKesson & Robbins were the only ones who could sell to retailers. As a matter of fact, that is alleged in the complaint.

Mr. Suthon:

I still insist that quantity discounts by wholesalers to retailers has no bearing on this contract.

Mr. Stone:

It has this bearing, when the deal is made, it puts the retailer in position to make large profits on the sales of a product even though he sells it far below the set price.

The Court:

I sustain the objection.

By Mr. Stone:

Q. In that period between April, 1948 did Calvert Distillers Corporation sell directly to anyone in this area?

A. What do you mean when you say "sell directly to anyone in this area?"

Q. Any retailers directly in this area?

A. Not that I know of.

Q. All of the Calvert then that was sold in this area was sold by the wholesaler?

A. That's right.

Q. And the two wholesalers were you and—

A. McKesson & Robbins.

Q. Did the Calvert Distillers Corporation's representative call on the retail trades with you at any time?

A. With me personally?

Q. With you or any of your employees?

A. Yes, called on the trade with my men.

Q. What was the purpose of that?

A. I imagine to sell merchandise and promote their items.

• • • • •

Q. Do you know whether or not Calvert Distillers participated in those deals that you referred to themselves?

A. Not that I know of.

Q. You mean that when a discount of two or three dollars a case was given by you for Calvert, that you or your firm did not participate in that?

A. I thought you meant when the representatives were with my men at the time they made the deals.

Q. When you made the deals you referred to for two or three dollars discount for quantity purchases, did you send the whole two or three dollars to the purchaser that you were given, or did Calvert participate in that with you?

A. If I recall right, Calvert did participate in it.

Q. And you participated in the discount?

A. Right.

Q. After a deal like that is made, is the retailer's price usually lower?

A. After a man gets a discount it is bound to get lower.

Objection: Mr. Suthon:

We object. It calls for a conclusion, not relevant or material.

The Court:

If you move to strike the answer to the last question, it will be sustained.

Mr. Suthon:

I move to strike the answer to the last question.

The Court:

Motion granted.

* * * * *

Q. Don't you know advertisements appeared in all of the papers on Calvert and other products supposedly fair traded, in which advertisers advertised those for sale at less than fair trade prices. Don't you know that?

A. I don't recall offhand right now whether they did or did not.

Q. Weren't you watching the Calvert market at that time?

A. I didn't solicit the trade to watch prices.

Q. You didn't care what they sold for?

A. That was the distiller's part.

Q. Didn't you tell some of the retailers you didn't care what they sold it for?

A. No. We suggested that they sell at retail price, and we always told them to go up in price.

Q. You always told them to go up in price?

A. Keep their price up.

Q. That was the instructions you gave them?

A. Yes.

Q. You must have found them selling for less—

A. When complaints came in.

Q. And you in turn advised the retailer to go up in prices?

A. Go up in prices if they were selling for less.

Q. You didn't report it to Calvert Distillers, did you?

A. That I don't recall, whether I did or not.

Q. How were these prices fixed to the retailer on Calvert?

A. The distillers would give us adjusted retail prices. I think they were figured on the basis of 33-1/3% to the retailer.

Q. Did those prices come to you from out of the State to Louisiana?

A. What do you mean when you say out of the State to Louisiana?

Q. How would you receive those suggested prices?

A. The distillers gave us suggested retail prices, what we were supposed to get.

Q. The distillers gave you the suggested retail prices?

A. Right.

Q. They never told you the fair trade price?

A. When it was the fair trade price they didn't.

Q. Do you know the retail price of particular retailers with whom you made deals, sold Calvert for?

A. I was not interested in what they sold for, I was interested in selling.

Q. You sold them without restriction?

A. So far as I was concerned.

Q. You are familiar with the whiskey business generally in the city of New Orleans?

A. Right.

By Mr. Stone:

Q. Don't you know that the practice prevailing in New Orleans while you were handling Calvert as a wholesaler in 1948 before Act 360 became effective, for the Calvert Distillers not to enforce fair trade contracts?

A. I don't know, I can't answer that.

Q. You know that they did not enforce it?

A. I can't answer that. As I recall, the contract was between the wholesaler and the retailer.

Q. Don't you know there were violations in New Orleans at that time?

A. I don't know.

Q. Don't you know that Calvert was sold off the fair trade contract during the few weeks before Act 360 became effective?

A. Maybe, but I don't know.

Q. You paid no attention to that?

A. No.

Q. Is there someone else who watches that?

A. No, Sir.

Q. Is there nobody in your firm that pays attention to that, Mr. Bologna?

A. No, sir.

Q. When you received your shipment of Calvert, from what places did that whiskey come? Do you know?

A. You mean the shipping point?

Q. Yes, the shipping point.

A. If I recall right I think it comes out of Louisville, Kentucky.

Q. Was any of that Calvert you distributed then manufactured in the State of Louisiana, that you know of?

A. Not, that I know of.

Q. It all came to you from outside of the State?

A. As far as I can recall.

By Mr. Wisdom:

Q. Did I understand you to testify that in some deals Calvert Distillers participated with you?

A. They didn't participate with me personally.

Q. It was a three-way transaction?

A. What do you mean by a three-way transaction?

Q. Distributor, wholesaler and retailer.

A. If I recall it right, Calvert's man worked with my man and if he had a deal they worked along with him.

Q. What do you mean by that?

A. If a man bought twenty-five cases of Calvert and we had a discount of two or three dollars, the retailer got two or three dollars, whatever the discount was.

Q. How much did you participate in that?

A. I don't remember.

Q. How many deals did you make in the period of a year?

A. I can't recall that.

Q. You can't recall that either?

A. No, sir.

Q. Can't you recall how much Calvert participated in the deal?

A. I can't recall, maybe a dollar, maybe a half dollar. I don't know.

Q. That is what I want to know. Do you know what happened after any particular deal, to the retail prices of Calvert?

A. I don't know what happened to it.

Q. You don't know what Calvert sold for after such a deal?

A. That's right.

Q. You don't know?

A. Don't know what?

Q. What Calvert sold for after such a deal?

A. I wasn't interested to know. That was with the distillers.

Q. When you made the deal to the retailer, were you ever accompanied by a representative of Calvert?

A. I personally?

Q. Anyone of your firm, of your own knowledge.

A. They have representatives working with my men.

Q. So that in a typical deal they were represented by Calvert and a member of your firm?

A. We made deals as wholesalers, and if the men went out they know what went on.

Q. I understood you to say that they gave up One Dollar to One Dollar and a half, for example—

A. No; they didn't make it to the retailer. May I explain more fully?

Q. Yes.

A. If I have a deal with the distiller they may say: "I will give you fifty cents a case or a dollar a case." Maybe five cases, give \$1.00 and twenty-five cases \$1.50. My man makes the deal, but that is the wholesaler making the deal.

Q. When Calvert Distillers make a deal with you, is it understood you are to make a deal with the retailer?

A. No. They will talk to us about it and we contemplate the deal. They have never forced us to go into a deal.

Q. I am not asking you if they worked with you and the retailer?

A. They worked with me.

Q. Do they see the retailer with you?

A. If they are men of mine, yes.

Mr. Stone:

That is all, Mr. Bologna.

Cross Examination:

By Mr. Suthon:

Q. Is there a quantity discount in the absence of a deal?

A. I don't get that question, in the absence of a deal.

Q. Did you ever make deals with retailers without first getting Calvert Distillers to participate?

A. I made deals without the help of the distillers.

Q. Is that the custom, is that usual?

A. I don't know if it is usual, but I have done it.

HAROLD J. BEVAN: Witness, being duly sworn on behalf of defendants, was examined and testified as follows:

Direct Examination.

Q. Please state your name?

A. Harold J. Bevan.

Q. What is your occupation, Mr. Bevan?

A. Sales Manager for James E. Comiskey Company.

Q. Does the James E. Comiskey Company distribute as a wholesaler the Calvert products?

A. Yes, sir.

Q. How long has Comiskey been handling as a distributor the Calvert products?

A. Approximately two and a half years.

Q. You were handling Calvert then before Act 360 went into effect?

A. Yes, sir.

Q. Were you handling Calvert in April, 1948 less than two years ago?

A. Yes, sir.

Q. Who were the other Calvert wholesalers in New Orleans at that time?

A. A. Bologna & Company.

Q. Since then and at the present time who are the Calvert wholesalers in New Orleans?

A. Since October First we are the sole distributors.

Q. Was McGuire a distributor?

A. Yes, sir.

Q. When was that?

A. We secured the line from him I think in May or June of 1947.

Q. You are familiar with what the liquor trade in this area commonly refers to as deals, are you not?

A. Yes, sir.

Q. Would you explain to the Court what you consider a deal, Mr. Bevan?

A. We call it discounts on three case lots, five case lots, ten case lots, twenty-five case lots, so much discount off.

Q. Was it common practice prior to the effective date of Act 360 for Calvert to participate in any deals?

A. Calvert has never participated in any deals with us.

Q. Have you given any deals on Calvert?

A. Yes, sir.

Q. What kind of deals have you given on Calvert since April, 1948 and right before the effective date of Act 360, July, 1948?

A. In one instance you might give \$2.00 off for ten case lots; fifteen case lots may be \$2.50. I don't recall it.

Q. Don't you know advertisements appeared in the Newspapers selling Calvert at less than fair trade prices just before Act 360?

A. Yes, but I know Mr. McGuire seen a few people and told them he did not want his cut.

Q. That was before Act 360 went into effect?

A. Yes.

Q. He didn't do anything about it?

A. Maybe the customers raised the prices.

Q. Don't you know that practically every retailer who advertised in New Orleans, advertised Calvert and Seagram for sale at less than the fair trade prices during that period right before Act 360 went into effect?

A. I don't know that.

Q. Many of them did?

A. There were a few, yes.

Q. Many of them undersold?

A. I was not there when the purchase was made.

Q. You knew what they were selling for?

A. No, I didn't buy it.

Q. Don't you know that only last week the Continent Liquor Stores in this city were selling for less than fair trade prices in this city of Seagram?

A. I don't know that.

Q. Didn't you make the statement that you knew that Scharfenstein and Continent were underselling Calvert when he published his ad in November of this year?

A. I don't know anything, because he didn't have any prices in the Paper.

Q. Don't you know he was selling for less than fair trade prices since the first of this month?

A. I don't know.

Q. Didn't you make the statement that you knew?

A. I was there when the man phoned and got the prices, but I didn't see it.

Q. It was no surprise to you?

A. That he was cutting prices?

Q. Yes.

A. It was none of my business. I went there and asked him to raise the price with Mr. McGuire.

Q. Don't you know the American Drug Store in New Orleans a few weeks ago advertised all A-Blends at less than the fair trade prices?

A. Yes. He had signs in his window.

Q. Don't you know that Katz & Besthoff in New Orleans about a month ago advertised Calvert for less than the fair trade price in the city of New Orleans?

A. I think there was a cut in price, and I also know that the Calvert official went to see Mr. Chapital and asked him to raise the price.

Q. Don't you know that Katz & Besthoff on November Eleventh advertised Seagram 7 Crown here for \$3.51 a fifth?

A. I can't remember that, that's a month ago.

Q. You read the liquor ads when they were in the Papers?

A. Yes.

Q. And you don't remember that?

A. Seagram doesn't interest me.

Q. I show you a newspaper, the Times Picayune dated Saturday, November 12, 1949 in which an ad appears by Solari advertising Calvert Reserve, fifth bottle, for \$3.25 and ask you whether or not you saw that ad in the Paper?

A. Yes, sir.

Q. You sell Calvert to Solari?

A. Our company. I don't know if we sold any prior to that, but I know we sold some since.

Q. I show you Newspaper dated November 10, 1949, the New Orleans Item in which there appears an ad by the American Drug Store, in which it states:

"The lid is off. Down go prices. All "A" Blends formerly \$4.24 now \$3.25." Is that the ad you stated you saw the American Drug Store run?

A. I told you I didn't pay any attention. I saw some in the window marked \$3.25.

Q. I show you a copy of the New Orleans Item of November 10, 1949 on which there appears an ad of Pap's Food Store in which Calvert is advertised at \$3.09 and I ask you whether or not you saw that ad?

A. Yes, sir.

Q. A matter of fact, you know Pap's ran several ads to that effect?

A. Yes.

Q. In several Newspapers?

A. Yes.

Q. What was the fair trade price of Calvert at the time that these ads appeared in the Newspapers?

A. Well, I think the Calvert people at that time were getting the contracts out to be signed, right around November Ninth or Tenth.

Q. What was the wholesaler's cost to the retailer of Calvert Reserve for fifths, per bottle without a deal?

A. \$3.31-1/2 or \$3.32.

Q. When Pap's advertised Calvert Reserve at \$3.09 he was advertising it for sale below cost. Is that correct?

A. Yes, sir.

Q. Do you know if there was any prosecution of Pap's for those ads?

A. As far as Calvert, I don't know.

Q. You sell Pap's?

A. No, sir. Our company sold them, but had not sold any to Pap's prior to that.

Q. Your company does call on them?

A. Oh, yes.

Q. Does the James E. Comiskey Company participate in the fixing of the prices that Calvert will be sold for by the retailer to the consumer?

A. We were instructed by Calvert officials at a meeting to enforce a fair trade price of \$4.24 and to ask all of them to ask for that price.

Q. When were you instructed to do that?

A. This was around November—the week following when the law became effective, when the law became valid.

Q. That was November Seventh?

A. Yes, sir.

Q. And a week later would be about November Thirteenth?

A. Yes, sir.

Q. Did you go out and tell the retailers to raise the price?

A. Our salesmen went out and told the customers to uphold prices on Calvert.

Q. At that time there were violations of prices in New Orleans?

A. Yes.

Q. Must have been, if you were told by Calvert Distillers to go out and enforce the fair trade contracts and told them to go up in prices?

A. Yes, because the new contracts had not been signed yet.

Q. Were you told to go out and do this before the new contracts became effective or after?

A. After.

Q. Before that they didn't tell you anything?

A. Told us it would be fair traded and were waiting for the contracts to be signed.

Q. And Calvert did not tell you it was not fair traded until the contracts were signed?

A. Waiting for the contracts to be signed.

Q. And according to their petition they allege they sent out notices through the Gulf States Beverage Journal of Coral Gables, Florida, so that would be about a week after the invalidation of Act 360. Was your meeting with the Calvert people after November 14th or before?

A. I am sure it was before. They called a special meeting.

Q. And they discussed conditions generally in New Orleans during that week?

A. Yes, sir.

Q. And you knew there was promiscuous undercutting of Calvert?

A. Yes, from ads in the Newspapers.

Q. And you were told, as I understand your testimony, they were going to enter fair trade contracts?

A. They were going to enforce fair trade prices as soon as they got the contracts out.

Q. You knew up to two or three weeks ago there was no enforcement of fair trade prices by Calvert in this area?

A. I know Calvert instructed us to instruct all of our customers to raise the price to the suggested retail price and as soon as they caught someone they were going to take action.

Q. Mr. Bevan, I don't know whether or not you answered this question. I think I started to ask it. The actual price of \$4.24 that Calvert sold for in this

area, who is that fixed by, Comiskey or anyone connected with Comiskey?

A. Fixed by Calvert to us.

Q. I am talking about retail sales, not wholesale prices?

A. Both prices are given to us by Calvert Distillers.

Q. They actually fix it?

A. Yes, sir, definitely.

Q. What office fixes it, the New York office or the local office?

A. I can't tell you that. Mr. McGuire here brings me the price lists on it.

Q. It might be in New York?

A. I don't know. It might be in St. Louis.

Q. Your firm is in New York?

A. No, sir, here in New Orleans.

Court recessed until 2:00 P. M.
2:00 P. M.: After Recess.

HENRY G. MCGUIRE: witness, being duly sworn,
was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Henry G. McGuire.

Q. What is your occupation, Mr. McGuire?

A. Louisiana State Manager for Calvert Distillers Corporation.

Q. Are you also employed by the Calvert Distilling Corporation?

A. No, sir. I was employed by the Sales Company.

Q. You say you are the Louisiana representative?

A. Yes.

Q. Will you state to the Court exactly what function the Louisiana representative of Calvert Distillers Corporation perform in Louisiana—Louisiana Manager or representative?

A. State Manager. Just this. All Calvert business transactions go over my desk in the State of Louisiana.

Q. You handle all of the sales of Calvert products in the State of Louisiana for Calvert Distillers to the wholesalers?

A. Correct.

Q. Are you the only person employed by Calvert Distillers in Louisiana handling such sales?

A. Yes, but of course, I have six men in the State, three in New Orleans, one in Shreveport and one in Baton Rouge and one in Lake Charles.

* * * * *

Q. Do you personally call on the Calvert wholesalers in this area?

A. Oh, yes.

Q. How many wholesalers do you have in New Orleans at the present time?

A. One now. We have had two.

Q. You have one now?

A. Yes, sir.

Q. How many did you have in March and April, 1948, and if more than one, who were they?

A. We had James E. Comiskey and A. Bologna & Company.

Q. A. Bologna is no longer your representative here?

A. That's right. I might qualify that A. Bologna is no longer our representative since October First. However, he still has some Calvert merchandise, and

I understand he will run out sometime this month. He didn't relinquish all of his merchandise to the other distributors, which is customary.

* * * * *

Q. Where is the home office of Calvert Distillers Corporation?

A. Chrysler Building, New York City, the Sales Company.

Q. Do you know under what laws of that State Calvert is incorporated?

A. I don't know, but I think under the laws of the State of Delaware, Maryland.

Q. It is not incorporated under the laws of Louisiana?

A. I wouldn't know.

Q. Would you explain exactly what Calvert Distillers does in Louisiana in distributing Calvert products? How does Calvert Distillers handle the sales of its products to its wholesalers?

A. It is a very simple procedure. Our wholesalers order from us and the product is delivered. The order is processed in St. Louis and goes more or less to the regional office, and then to New York.

Q. Do you have the stock that you sell to your Louisiana purchasers in the State of Louisiana?

A. No, we do not.

Q. Have you a State license to engage as Broker in the State of Louisiana for Calvert?

A. No, sir.

Q. Aren't you actually acting as a Broker in the State of Louisiana for Calvert products?

A. No, sir.

Q. Let me see if I understand you again. You have no stock at all in Louisiana. You take an order from a wholesaler for whiskey, for Calvert products. You in turn send that order to your New York office?

A. No, sir, to our division office in St. Louis.

Q. What happens to the order after arrival in St. Louis?

A. It is processed in the St. Louis office and goes more or less to the regional office, then to New York.

Q. Where is the order sent?

A. To Louisville and sometimes Maryland.

Q. So that all the whiskey that comes into Louisiana comes from Kentucky and Maryland?

A. Yes.

Q. So that all of the whiskey that comes into Louisiana comes from Kentucky and Maryland and is assigned to a definite wholesaler here in New Orleans. Is that correct?

A. I would say so.

Q. I mean, none of that whiskey is sent from Louisville or Maryland to Calvert Distillers for subsequent deliveries to the wholesalers?

A. No. All of our orders are processed in New York and passed on to our plant in Louisville, Kentucky, to our traffic department.

Q. How long have you been connected with Calvert Distillers?

A. Since August, 1935.

Q. How long have you been stationed in Louisiana as their representative?

A. Since that time.

Q. When Calvert Distillers wishes to fix a retail price at the retail level, on its products, from which office does the established price originate? By that I mean, are you in your Louisiana office the one who fixes that price, or is it New York that fixes that price?

Objection: Mr. Suthron:

We object. I don't see the materiality of going into office procedure.

Mr. Stone:

We want to prove up the Interstate Commerce nature of this transaction, to show one integral transaction under Interstate Commerce clause, otherwise we could not argue it under the law. The only way we can prove it is one big integral movement from the Distillers into the retailers' hands.

The Court:

I don't think there is any question here as to Interstate Commerce. All shipments were made in Interstate Commerce.

Mr. Stone:

I want to show that the sale was integral at retail level and part of that commerce.

The Court:

I don't believe there is any question about it. Objection overruled. Suppose you answer the question.

A. That question is an involved one. I am certainly not at all instrumental in arriving at prices. inter-office correspondence, or checking freight rates here. My prices I get here comes from St. Louis. Our prices are made up in New York and sent to us—to the St. Louis office through the proper channels.

Q. Then the prices paid at retail level are actually fixed in New York and subsequently appear in the fair trade contracts. Is that correct?

A. I would say so.

Q. Except for freight and local taxes, does Calvert maintain the same prices throughout other States in the Union in which whiskey is sold?

A. Yes. Our base price remains the same regardless of the State.

Q. The only difference then is freight and local taxes, whatever they may be?

A. That's right. I might add to the question a moment ago, in getting up prices I have done it very often. I have drawn prices up and submitted to St. Louis, and one to New York. We do have the originals here. There are corrections, I can make mistakes.

Q. You mean you can fix the price for which Calvert can be sold all over the United States?

A. Yes, but they check up there.

Q. You mean the State tax?

A. The whole thing, check the whole price. I just did it recently on Carstairs.

Q. We are talking about Calvert. Isn't that price fixed at the retail level and you in New Orleans carry out that part—you have a part in it?

A. We all have a part in it.

Q. Louisville, Chicago and New York?

A. Not Louisville.

Q. St. Louis, Chicago and New York; you all have a part in fixing the prices at retail level?

A. Yes, sir.

Q. Mr. McGuire, I show you three contracts which your Counsel has advised are three of the contracts entered into in 1949 by Calvert Distillers, and I ask you to identify those contracts, if you can, by signatures?

A. Yes, sir.

Q. Are those contracts, the dates of November 12, 1949 between Calvert Distillers Corporation and Chester Bruning, and November 13, 1949 between Frank

Musso and Calvert Distillers Corporation, and November 16, 1949 between Calvert Distillers Corporation and Ben Abadie, contracts you entered into with these retailers on behalf of Calvert Distillers Corporation?

A. Yes, sir.

Q. Did you do that on instructions from your Home Office, or your office in New York, or out of State office, whichever it may be, or did you take it upon yourself without consulting them to enter into these contracts?

A. I did that on instructions from the office—

Q. Where are the originals of these contracts filed?

A. You have them there.

Q. Where are they usually kept after they are signed?

A. We generally keep them in our office.

Q. Weren't they actually kept in New York, the ones you just identified?

A. No. A couple of them went to New York as evidence that they were signed, and so on and so forth.

Q. Where were the contracts actually prepared?

A. I wouldn't know.

Q. You had nothing to do with the preparation of the contracts?

A. No, sir.

Q. Are these contracts the same as prevailed in other States, as far as Calvert is concerned?

A. I wouldn't know about other States.

Q. You are only concerned with prices—

A. I am only concerned with Louisiana.

Q. Do you know the exact date that notice was sent to Schwegmann Brothers that Calvert was fair trading its products?

A. I can't answer that.

Q. You don't know that?

A. I don't know.

Q. You didn't send out the notice?

A. I imagine it was probably on the 14th or 15th of November.

Q. They were then mailed?

A. They were mailed sometime prior to that, or on the 14th.

Q. Did your office mail them, or were they mailed out of one of Calvert's offices out of the State?

A. It was physically impossible for mail of that kind to cover the entire State. We use a Pitney-Bowes mailing machine which is in the hands of Gulf States Beverage Journal of Coral Gables, Florida.

Q. So that the only notice that Calvert Distillers sent to Schwegmann and other retailers, originated in Florida?

A. Correct.

Q. And you assume it was handled about the 14th of November?

A. The 13th or 14th, something like that.

Q. Where is the Calvert whiskey manufactured?

A. It is manufactured in Maryland and Kentucky.

Q. Any manufactured in the State of Louisiana?

A. Not to my knowledge.

Q. Mr. McGuire, I am going to show you some ads that appeared in the New Orleans Newspapers in November, 1949 and ask you whether or not you saw those ads when they appeared in the Papers? The first Ad I show you is in the New Orleans Item, dated Thursday, November 10, 1949, an ad by Pap's Food

Store in which Calvert is shown as being offered for sale at \$3.09 a fifth, and I ask you if you saw that ad?

A. Yes, I saw it.

Q. I show you another ad by Pap's Food Store that appeared on Friday, November 11, 1949 in which Calvert Reserve is advertised for \$3.09 a fifth. Are you familiar with that ad?

A. Yes.

Q. I show you the New Orleans Item of November 10, 1949 showing an ad by the American Drug Stores reading: "The lid is off.—Down go prices. All A-Blends formerly \$4.25 now \$3.25." Are you familiar with that ad?

A. Yes.

Q. Which of the Calvert products are considered A-blends?

A. A-Blend is a terminology that comes into this business, "A" not meaning that they are excellent by any stretch of the imagination. Many of them are good, many are not, but whiskey falling into that category sells for about \$4.00 or \$4.50.

Q. Is Calvert generally known in this area as A-Blends?

A. Yes.

Q. And you don't think it is good whiskey?

A. Under that classification some are good and some are not.

Q. What Calvert product was it?

A. Carstairs White Seal.

Q. What price did you maintain on those products?

A. \$4.24 a fifth on Calvert Reserve; Carstairs White Seal, \$3.81.

Q. Do any of those fall in that category as B-Blends?

A. None at that time.

Q. I show you advertisement dated Saturday, November 12, 1949 by Solari, in which it states: "Now—Let's sell Liquor Calvert Reserve, Schenley Reserve 5th bottle, \$3.25." Are you familiar with that ad?

A. Yes, all ads.

Q. You know many ads were run during that week advertising Calvert products for less than \$4.24?

A. I read them all. It was to my interest to read them all.

Q. And you know many firms sold Calvert A-Blend for less than \$4.24?

A. Yes.

Q. Did Schwegmann run any ad?

A. I don't know. I imagine he did.

Q. I tell you as a matter of fact he did not. Don't you know he hadn't run any price ads on liquor until Act 360 became invalidated?

A. I don't know.

Q. Have you any plans at this time to sue the American Drug Store, Katz & Besthoff, Pap's, and the others who advertised in the Newspapers; Solari who advertised Calvert for less than the fair trade price?

A. Those places had been shopped already.

Q. What do you mean by that?

A. Shopped to see whether the prices were in line.

Q. Do you mean to say that Solari and the American Drug Store and Katz & Besthoff did not honor the ads they run in those newspapers and sell this particular product at the price they advertised?

A. They did at that time.

Q. Did you follow the ads to see whether they were complying—

A. Our machinery wasn't set up then for Court cases.

Q. You got your machinery up in a hurry to shop Schwegmann?

A. The very next day, and also Katz & Besthoff, and those accounts you mentioned.

Q. Didn't you warn them first you were coming?

A. I went out to quite a few of these places and told them to raise their prices.

Q. But you don't intend at this time bringing any injunction proceedings against Katz & Besthoff, Solari, Pap's, or the American Drug Store for those violations which took place by newspaper advertisements, which you say you remember so well appearing after Act 360 was invalidated?

A. We shopped those places.

Q. Wouldn't those ads you saw in the Newspapers cause you to proceed against them?

A. That is a question for our attorneys to decide.

Q. But you don't know whether they honored those ads they had in the newspapers to sell Calvert at those prices?

A. They must have.

Q. Certainly they have, they must have. Don't you know it?

A. I say they must have.

Q. You still have not answered my question as to why you did not prosecute those who had the ads in the Newspapers?

A. I am not the prosecutor.

Q. Aren't you the Manager?

A. Yes.

Q. Aren't you the one who represents the Calvert Distillers in the State of Louisiana to enforce their fixed prices, Mr. McGuire?

A. Yes, sir.

Q. Isn't that your job?

A. My job is to supervise that.

Q. It is not the lawyer's job to do your job?

A. My job is to supervise.

Q. Why didn't you prosecute those four or five you knew so well that advertised during that week instead of selecting Schwegmann to prosecute him?

A. Their prices were in line.

Q. Isn't it a fact that you had to clear these prosecutions in New York?

A. No, sir. I make that decision here.

Q. You know what a deal is in the liquor trade?

A. I should know.

Q. When Calvert wholesalers enter into a deal, it has been testified by two representatives of wholesalers, that frequently Calvert Distillers participate in that deal?

A. Correct.

Q. When that deal is made with a retailer to give him a discount per case on purchases of three cases, five cases, ten cases, doesn't Calvert Distillers, or don't they in many instances participate with the wholesaler in allowing that discount by standing part of the cost of that discount with the wholesaler?

A. That happens, but it takes many forms. A distributor asks us sometimes for fifty cents a case or a dollar, with the idea of increasing sales in a particular month, or get him an extra earning. Sometimes it is in the form of sales promotion, window displays

and counter displays. Sometimes it is taken off and added to what the wholesalers put up, and comes off in the form of trade discounts, yes.

Q. So that Calvert distributors does participate in the two or three dollars given by wholesalers to retailers?

A. Yes. When the wholesaler asks us for that sometimes we acquiesce and sometimes we don't. Generally we don't.

Q. Don't you frequently, in order to promote the sale of Calvert, encourage the wholesalers to go out and make a deal?

A. No.

Q. Do you not frequently encourage the wholesaler to enter into deals because of the large quantities of merchandise that you require him to take, which he must have the money to pay you for on a certain date?

A. No, sir. Our inventories at wholesale houses are considered very low.

Q. You have no inventories here in Louisiana?

A. We have normal inventories, about thirty days and—

Q. In New Orleans?

A. Yes.

Q. Calvert Distillers have?

A. Our wholesalers.

Q. You keep them supplied with a thirty day supply?

A. If they order it, yes.

Q. Don't you frequently force them to take merchandise?

A. Never.

Q. I am not talking about your Calvert Specials or Calvert A-blends. I am talking about other products distributed by Calvert Distillers.

A. We never force any of them to take anything they cannot sell.

Q. Your three salesmen and yourself call on the retail trade as well as the wholesale trade?

A. Their work is definitely one of sales promotion.

Q. So that you or anyone of those men working under you might go out with a salesman from the wholesaler to visit the retailer to try and encourage the sale of your products?

A. Oh, yes. His function is primarily that of sales promotion.

Q. Doesn't he frequently go out with salesmen of wholesalers when deals are made?

A. Not necessarily?

Q. Doesn't he make deals?

A. No.

Q. But Calvert representatives do call on the retail trade and keep in touch with the retail trade?

A. Oh, yes.

Q. And they call on retailers with wholesalers present?

A. Yes.

Q. And they do talk of deals?

A. With the wholesaler and not the distiller man.

Q. When the retailer buys any quantity at a reduction of three dollars a case, is it done with the idea the retailer will sell at reduced prices to the consumer?

A. No.

Q. It is only done in order that the retailer can make more money?

A. That's not the original intention. That means extra profit for that retailer for buying that much merchandise and putting it in the store and featuring it.

Q. Then you prohibit by this contract passing on that extra profit this retailer makes to the consumer?

A. Yes. We are opposed to cutting prices.

Q. As a matter of fact, don't you know the retailers do pass their savings on to the consumer?

A. He doesn't have to. He can pass it on to his clerk, if he wants to.

Q. Don't you know he frequently passes that on to his consumers?

A. Certainly.

Q. And isn't that the reason given in order to sell your products at a lower price to the consumer?

A. Not my company.

Q. You referred to machinery set up for enforcing fair trade. Exactly what do you mean by that?

A. I mean getting in touch with my superiors.

Q. Where are your superiors located?

A. One in St. Louis, one in Chicago, and of course, in New York, and discussing these things by telephone, meetings. That took time, and it took time to see the attorneys also. The department in New York must give us an okay on these things, and see that everything is all right and cleared, and everything. It takes time.

Q. You were in the Court room a little while ago when Mr. Bevan testified, the gentleman who represents one of your wholesalers?

A. Yes, sir.

Q. He said that Calvert had called a meeting to see to it that prices were upped on Calvert. Did you attend that meeting?

A. Yes, at the house of Comiskey. We have sales meetings every Thursday night. I am there on every Thursday night and I take part in the meetings. In fact, I took over most of that meeting in the discussions on fair trade, to tell them again what it meant, and I knew about it, and we told them we meant business, to encourage their customers to raise prices, and report it if anyone did not do it. I went to Shreveport, Baton Rouge and Lake Charles to tell them.

By Mr. Suthon:

Q. Referring to the advertisement of the American Drug Store, advertisement on November 10 that you were shown by Mr. Stone, advertising A-Blends, which I understood you to say included Calvert Reserve at \$3.25. Have you any information that after November 14 the American Drug Store was selling or advertising, or offering to sell Calvert products at less than the fair trade price?

A. The American Drug Store is not cutting the price of Calvert products.

Q. Have you had any contact with the American Drug Store?

A. Mr. Farnet phoned me himself.

Q. What were your contacts with him?

A. I went to him personally and asked him to raise his prices, if he had not done so, and my further contact was the shopping there.

Q. What was his response to you after you spoke to him?

A. He raised his prices.

Q. I believe Katz & Besthoff was mentioned in your examination by Mr. Stone. Have you any information that since November 14, that Katz & Besthoff were offering for sale Calvert products at less than the fair trade price?

A. Katz & Besthoff are not cutting prices.

Q. Did you have any conversation with anyone there?

A. Yes, Mr. Chapital.

Q. What was your conversation with him?

A. After he ran that ad he called me and wanted to know about Calvert's fair trade policy. I went up to see him personally and I told him our position on fair trade, and he asked if he ran the ad that day and cut prices would I do anything, and I told him I certainly would, that I would take Court action.

Q. Then what did he say?

A. He said: "That's what I wanted to hear."

Q. Mr. McGuire, I show you a clipping from the New Orleans States of Monday, November 7, the date, upon which the decision was rendered by the Louisiana Supreme Court on Act 360 of 1948, and I call your attention to the following printed language in that clipping, which I ask you if you read on or about November 7, or thereabouts? "A decision in favor of—" (Counsel reading down to) "—I would like to fight that law too." That is the end of the notation. Did you read that on November 7th?

A. Yes, sir.

Q. I also show you the Times Picayune of November 8th, in which the same language appears as attributed to Mr. Schwegmann. Did you see that on November 8th?

A. Yes.

Offer: Mr. Suthon:

We offer in evidence the two newspaper clippings which have just been referred to in the testimony of the witness, marking them for identification McGuire-1 and McGuire-2.

The Court:

Any objection?

Mr. Stone:

No objection.

By Mr. Suthon:

Q. You spoke about a meeting at Mr. Comiskey's house on Thursday night at which you had some discussion with the salesman. Which Thursday was that with reference to the decision—

A. That was the 10th or 11th.

Q. I think it is agreed that the decision of the Louisiana Supreme Court was handed down on November 7th?

A. That's right.

Offer: . Mr. Suthon:

We offer in evidence also the three contracts identified by this witness and we will mark them for identification Calvert-1, Calvert-2 and Calvert-3.

The Court:

Let them be admitted.

Mr. Suthon:

In connection with the 1948 contracts, I don't believe I will put all of them in the record. What about putting one in the record and then listing the others with the names and dates?

Mr. Stone:

Objection.

With reference to those 48 contracts, I would like to object on the ground those contracts are of no legal effect. I assume the time to argue that is when the case is being argued. I make that reservation at this time, objecting to those being introduced.

The Court:

I overrule the objection. Suppose you file one as a model and then make a list of the others, giving the dates and the names.

Mr. Stone:

That will be agreeable. I don't think Counsel needs to file the whole list, whether fifty, a hundred, or twenty-five. It will not affect the outcome of this case. He might file one or two in the record, and a few others, so we can get the difference in dates so we will know the period that is covered.

Offer: Mr. Suthon:

I offer in evidence to be marked Calvert-4 a contract between Calvert Distillers Corporation and Jake Graffagnini, dated March 26, 1948. And we will offer in evidence, to be prepared and filed after checking between Counsel, to be marked Calvert-5, a list of other similar contracts, with the dates and names of the parties to the contract in each instance.

The Court:

They will be accepted when filed.

FRED SCHARFENSTEIN, witness, being duly sworn on behalf of defendants, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Fred W. Scharfenstein.

Q. What is your occupation, Mr. Scharfenstein?

A. Owner of Continent Wine and Liquor Company.

Q. Where do you operate?

A. 1215 South Claiborne Avenue, New Orleans, La.

Q. You have more than one store in the city of New Orleans?

A. Yes.

Q. How many stores do you have here?

A. Seven retail stores.

Q. And one wholesale establishment?

A. That is correct.

Q. Do you handle Calvert products as a wholesaler?

A. No.

Q. Do you handle Calvert products in your seven retail stores?

A. Yes.

Q. How long have you been in the retail liquor business in New Orleans?

A. Approximately 15 years.

Q. In addition to the retail stores that you own, are you connected with any liquor dealers associations in New Orleans or Louisiana?

A. No.

Q. Were you ever connected with any?

A. Yes.

Q. Did you hold any office in any liquor dealers associations?

A. Yes.

Q. What office did you hold?

A. Which one do you refer to?

Q. In any liquor dealers associations?

A. I was president of the Liquor Dealers Association.

Q. When did you terminate your office as president?

A. Six or seven months ago.

Q. Do you know what Calvert was being sold for after Act 360 was invalidated by Act of the Supreme Court, by retailers in New Orleans?

A. After Act 360 was invalidated there became a condition which was very competitive and there were several different prices at which it was sold.

Q. Was it generally sold throughout the city of New Orleans for less than \$4.24?

A. I don't know how general it was. All I can testify to is what ads I had seen in the newspapers, what somebody else might have undersold it for.

Q. And in your stores you immediately proceeded to sell for less than \$4.24 too?

A. Correct.

Q. And you were selling Calvert for less up to and including December 6, 1947, when you ran your last ad?

A. In fact, I am selling it for less than that now.

Q. You are selling it for less than that now?

A. Yes.

Q. Why are you selling it for less than fair trade prices?

A. To meet competition.

Q. You mean you meet competition in the New Orleans area?

A. That is right.

Q. Would you explain to the Court the present situation in New Orleans with respect to the sale of Calvert at the retail level?

A. You mean in quantity or price?

Q. Price.

A. I can't say what anyone else is doing except myself. I can't testify to what somebody else is doing.

Q. What do you mean by meeting competition?

A. I read ads in the papers. I read the newspapers to see what is going on. It is a policy of my company to meet competition where and when we find it.

Q. It wasn't only the ads that you used to predicate the meeting of that competition?

A. The only thing we could predicate it on.

Q. You have sold and you are still selling Calvert for less than \$4.24 now, and I know of no ads that have appeared in the last few weeks on Calvert. Do you?

A. No.

Q. However, you are continuing to sell it for less now to meet competition?

A. Correct.

Q. What competition have you now?

A. If somebody comes in to buy whiskey and kicks about the price, and states he can buy it for less somewhere else, we try to meet competition.

* * * * *

Cross Examination.

By Mr. Suthon:

Q. Mr. Scharfenstein, did you receive a notice by mail from Calvert Distillers Corporation about three or four weeks ago with a list of fair trade prices?

A. Yes.

Q. Are you the same Mr. Fred Scharfenstein doing business as the Continent Wine and Liquor Company, which has been sued in this Court under suits No. 2624, Civil Action and No. 2625, Civil Action, the records of which I now hand you?

A. This morning in the Court room I was handed these particular papers and I have not had time to read them and say whether or not they are the same as the ones you have or not. I haven't had time to look at them.

Q. What are those numbers?

A. 2624 and 2625. Yes, that is correct.

Offr. Mr. Suthon:

We offer in evidence the record in the suit of Calvert Distillers Corporation versus Fred Scharfenstein, doing business as Continent Wine and Liquor Company No. 2624, Civil Action on the docket of this Court, and Seagram-Distillers Corporation versus the same defendant, No. 2625, Civil Action on the docket of this Court.

The Court:

Let them be admitted. The Court will take judicial notice of those, so they won't have to be filed.

Mr. Suthon:

That is all of the cross examination.

Mr. Stone:

That is all.

JOHN SCHWEGMANN, witness, being duly sworn on behalf of himself, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. John Schwegmann.

Q. You are one of the partners in Schwegmann Brothers, a partnership?

A. Yes, sir.

Q. You are one of the parties sued in this proceeding by Calvert Distillers Corporation. Is that correct?

A. Yes, sir.

Q. Where is your business, Mr. Schwegmann?

A. 2222 St. Claude Avenue.

Q. What business are you in?

A. General retail merchandise business, food, hardware, liquors, wines, meats, vegetables.

Q. What kind of service do you have there, a self-service operation?

A. Yes. We have a retail operation. More or less everybody wants to help themselves and they buy and get checked out like the chain stores.

Q. You maintain a liquor department?

A. Yes.

Q. And in your liquor department you sell liquors and wines at retail. Is that correct?

A. Yes.

Q. Have you handled whiskey known as Calvert Special?

A. We got Calvert Reserve. We got hundreds of various whiskies. I think we got Reserve right now.

Q. You are charged with having sold Calvert Reserve whiskey at your place of business known as Schwegmann Brothers Super Market on Friday, November 18, for \$3.35 including sales tax? Did your place of business consummate that sale, is that correct?

A. Yes, sir.

Q. Your establishment sold Calvert products for less than fair trade prices?

A. Yes, sir.

Q. What Calvert did you then have in stock?

A. That was Mr. Gus Blancand I got a deal on. We got \$3.00 a case off. I applied that and passed it on to my customers. I don't think it fair to overcharge my customers. My policy is to be economical and fair with all of my customers. That's what I made up my mind to do and that's what I did. I want my whole life to be straight, because that is the way all of us should make our living.

Q. You have been in the Court room and you heard reference made to Pap's Food Store which sold Calvert at less than the suggested price. Pap's is located near you, is it not?

A. Within walking distance.

Q. What is your policy with respect to marking up prices?

A. Mr. Stone, I believe in a fair profit, not too much. I don't sell below cost. I couldn't meet Mr. Pap's prices and I ignore it. The price I sold my Calvert whiskey for was \$3.25, plus sales tax. I watch and see where I can buy the cheapest, and I pass the savings on to my customers, but I can't sell below cost, and I am not going to try to.

Q. Did you ever sign a contract with Calvert?

A. No, sir, never signed no contract.

Q. To fair trade their products?

A. No, sir.

Mr. Stone:

No further questions.

Cross Examination.

By Mr. Suthon:

Q. You know for years that Calvert had fair trade contracts with other retailers?

A. I knew some sort of contract was made. I never knew it was notification to me unless I signed it. I knew there were some contracts.

Q. You have known for years there is such a thing as fair trade contracts?

A. Yes, sir.

Q. And they had been made by Calvert with other retailers?

A. Yes, sir.

Q. But as you say, you never signed one yourself?

A. No, sir.

Q. And before this price list you got from Calvert in 1949, you had previously gotten another price list from Calvert?

A. In the mail there was all sorts of price lists on all other liquors. I wouldn't say that this was not included in there.

Q. You got fair trade price lists from various distributors from time to time?

A. Yes, sir.

Q. I show you, Mr. Schwegmann, a clipping from the New Orleans States, dated November seventh, already offered in evidence marked for identification "McGuire-1" and I call your attention to the heading in that clipping: "A decision in favor of the public," and ask you if you published that?

A. Yes, that's right. Can I say something?

Q. Yes.

A. I am a respecter of the law. When a law is made that does not consider the welfare of the people—I don't say I would violate that law—but I use everything at my command to come into Court to nullify that law.

Q. Also another clipping of November eighth quoting you as having knowledge of the fair trade contracts. Is that correct?

A. Yes, sir.

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Q. Mr. Schwegmann, as to any Calvert liquor that you purchased after November 18, 1949, or thereabouts, after you got this price list from Calvert, as you say a few days before Thanksgiving Day, what did you propose to sell that for if you were not restrained, or would you have sold it at fair trade prices as notice to you by Calvert?

Mr. Stone:
Objection.

I object to that. What he proposes to do or proposes not to do is irrelevant.

The Court:

I overrule the objection.

A. Effective last Tuesday it wasn't whether I wanted to any more. It was a question of the minds meeting and making an understanding, not that I would want to do it, but I would do that. Whatever decision the Judge might make from today on remains in his power. I don't know what I will do tomorrow. That's a question for the Judge to decide.

Q. I don't think I made myself clear. You testified that you received a notice from Calvert a few days before Thanksgiving Day, giving you a list of fair trade prices binding on retailers. Now as to Calvert liquor that you bought from Calvert, would you feel that you would still sell at a cheaper price, or would you consider that you were bound to sell at the fair trade price?

A. I don't know if I could answer that question. They had a \$3.00 rebate.

Q. I am not talking about what you bought from Mr. Blancand. I am talking about when you got that list?

A. We even stored away that liquor. I feel as though—in other words, I don't believe in that law. I don't think it is fair to the consumer, and I don't think at this time I could honestly say that I could do that. I think I could go on and sell cheap.

Q. Even after you received the price list of the liquor?

A. Let me see how I would answer that question. If I would have signed that contract, with this thing mailed to me, if I gave that man my understanding, I still think all that other liquor I bought from Gus Blancand, which

I bought that liquor before that notice was mailed to me, I could sell it cheap.

Q. You are still talking about a different liquor than I am asking you about. I am asking you after you got that price list?

A. Honestly in my heart I think I would. I would have to lie to you if I said I wouldn't. Whether it was the same price or more depends upon what kind of deal they gave me.

Mr. Suthon:

That is all.

Re-Direct Examination.

By Mr. Stone:

Q. Is it your intention to handle Calvert products after this case is disposed of, if you can't sell it for less than the fair trade price?

A. I think the merchandise I have, my customers should make that decision and not me.

Q. So you are intending to handle Calvert, are you not?

A. Yes, sir.

Q. With respect to the Calvert that you might buy right now, knowing that fair trade contracts are in existence, and assuming that those are valid contracts, and you were told that they were valid contracts, would you then violate the prices and sell it cheaper?

A. No, sir, but I would inform the people that the price they are paying for Calvert was more than I want to charge them. In other words, the law is in force right now.

Q. In other words, you would sell Calvert at the fair trade price, assuming that you are satisfied that this contract that they based their prices on is a valid one?

A. If the Judge said I had to do it I will do it and continue selling Calvert.

Q. If you were told the contract was a legal one by your counsel, you would continue to sell it at fair trade prices?

A. Yes, sir.

Q. You would not deliberately violate the fair trade contract unless you thought that the contract might be invalid?

A. If I entered into a contract with them and I agreed to sell it at the fair trade price I would do my obligation. In this case I didn't sign it, and if the Judge says it is in effect I will carry out the orders of my attorney and the Judge.

By Mr. Suthon:

Q. But if it were left to you without any order from the Court?

A. No, sir, I wouldn't go into no contract with anybody that would compel me to overcharge my customers.

Mr. Stone:

He still does not understand it.

The Court:

Develop it further.

By Mr. Stone:

Q. The question I want you to answer; if you purchased Calvert now—

A. Yes, sir.

Q. —and if this suit was dismissed, we will say, upon the ground that there is no violation because of the fact you had purchased this particular Calvert before the fair trade price went into effect—

A. Yes, sir.

Q. —and you had purchased Calvert, what would you do with respect to maintaining prices on that Calvert?

A. If I bought it before or after?

Q. If you bought it right now?

A. Well, I would have to charge the price.

Q. Charge the full legal price?

A. Certainly.

Q. Even though personally you would not want to do it?

A. That's right.

Re-Cross Examination.

By Mr. Suthon:

Q. Why would you have to charge the full price?

A. He says when I enter into a contract without being signed, I am only obligated when the notice arrives. This liquor I bought before does not enter into the contract, I don't become a party to the contract. I become a party to the contract when I receive a notice. No use me giving you my opinion.

Q. If this suit is dismissed you mean you would now sell this liquor at less than the fair trade price?

A. I don't think altogether. I didn't have a notice or telegram sent me, never was sent to me; never a man came to New Orleans asking me to sign that contract. They only write me what they are delivering.

Q. Then you would not think that you were bound by that contract unless you got an Order of Court, or signed the contract —

Mr. Stone:

He did not say that at all.

The Court:

Let Counsel finish with his question.

By Mr. Suthon:

Q. Then you don't think you are bound by that price list you now have gotten from Calvert even on Calvert liquor you buy today or after today, you would not think you were bound by that price list unless the Court ordered you to do so?

A. Since I am in a suit for injunction I don't think it would be a matter of what I think. What I am thinking is what I had before around the time they sent me the notice.

Mr. Suthon:

That is all.

• • • • •
Testimony On Behalf of Plaintiff.

MARVIN LEVIN, witness, being duly sworn on behalf of plaintiff, was examined and testified as follows:

Direct Examination.

By Mr. Suthon:

Q. Please state your name?

A. Marvin Levin.

Q. Where do you reside, Mr. Levin?

A. Miami, Florida.

Q. Who are you employed by?

A. I am the publisher and sole owner of Gulf States Beverage Journal, a liquor trade publication.

Q. About the middle of November, 1949, did you do any mailing of literature for Calvert Distillers Corporation to the liquor retailers in Louisiana?

A. Yes, I did.

Q. I show you two documents attached to the complaint in this case, one being a letter dated November 14, 1949, on the stationery of Calvert Distillers Corporation, addressed to "Dear Mr. Retailer," signed "Walter F. Terry, Assistant Vice-President," marked Exhibit-B, reading "This company has entered into Fair Trade Contracts, pursuant to the Louisiana Fair Trade Act, with retailers in the city of New Orleans," both of these documents attached to the complaint marked Exhibit-B, and I ask you if you mailed that document for account of Calvert to all Louisiana liquor retailers?

A. Yes, I did.

Q. From what point was that sent?

A. From Coral Gables, Florida.

Q. On what date was it mailed?

A. November 12, 1949.

Q. How about the postage on that mail, was it properly stamped?

A. Yes. We have a machine to stamp all envelopes.

Q. Can you tell me whether that mail included the literature to Schwegmann Brothers in New Orleans?

A. I can tell you if I refer to my list.

Q. Please refer to your list and tell me whether or not it was sent to them?

A. Yes. John, Jr., and Paul Schwegmann, and another one at 901 Piety Street, New Orleans, Louisiana.

Q. Can you testify positively both of the Schwegmanns were included in that mailing?

A. Yes, sir.

Q. You have a list of the Louisiana retailers, have you not, in your Journal?

A. Yes, sir.

Q. What class of mail was that sent by?

A. First class mail.

Q. Can you approximate how long it takes a piece of first class mail to come from Florida to New Orleans?

A. A maximum of two days.

Q. To how many retailers in the State of Louisiana approximately was that mailing sent?

A. We have them broken up into two sections, the city of New Orleans, and the balance of the State. Our mailing to New Orleans was 1400 and the balance of the State was 3400. There have been some new licenses added to the list which have not been received to date and those were not included in this mailing.

Q. How do you make your lists up?

A. We get them from the State ABC Board.

Q. Your mailing was completed around the middle of November of this year?

A. Of course.

Cross Examination.

By Mr. Stone:

Q. Mr. Levin, who instructed you to send out these notices?

A. Mr. Charles Isaacson from Seagram in New York.

Q. It is one of the subsidiary corporations?

A. No, Sir.

Q. He is office manager for Seagram, Calvert and Franklin?

A. That's right.

Q. He is in New York?

A. Yes.

Q. How did he communicate with you?

A. Called from New York and then sent the letters.

Q. What date did he call you on the phone?

A. The early part of November.

Q. He called you and—exactly what did he say?

A. That I have a Fair Trade mailing. Will you handle it for us for all New Orleans Account?"

Q. He told you that about November ninth?

A. Around that, yes.

Q. He told you he had a Fair Trade mailing and he wanted you to handle the mailing. Is that correct?

A. Yes, Sir.

Q. Your letter states Calvert Distillers Corporation, and you indicate the original letter is signed by one Walter F. Terry, and states: "This company has entered into Fair Trade contracts, pursuant to the Louisiana Fair Trade Act, with retailers both in New Orleans and elsewhere in Louisiana. The recent decision of the Supreme Court of Louisiana is not applicable to the Fair Trade Act or to these contracts, which are in full force and effect." Did he tell you that he had entered into new Fair Trade contracts then?

A. No, he told me nothing. All he told me was the mail he was going to send down.

Q. That was about the ninth or tenth?

A. Yes.

Q. And he mailed you this form letter? (Indicating).

A. Those were shipped to us air express from New York.

Q. Do you know exactly the date you received those in Miami, Florida?

A. The phone call was on the ninth and we received it on the tenth or eleventh.

Q. And you immediately made up envelopes?

A. Upon receipt of the phone call I asked him to send the envelopes down so we could address them.

Q. How long did it take you to address them?

A. Little over an hour.

Q. How long did it take you to stamp them?

A. Run them through in no time.

Q. Is it possible your letter to Schwegmann could have been mailed on the date it is dated and not on November Twelfth?

A. It was mailed on November Twelfth. I have my statement of mailing here. (Witness referring to document). It was sent out on the Twelfth.

Q. And you had gotten instructions to do that a few days before?

A. That's right.

Q. Did you have any negotiations with Calvert Distillers in New Orleans with respect to this?

A. Absolutely none.

Q. All your contacts were with New York?

A. That's right.

Q. Who sent you the prices that you enclosed in that Exhibit-B?

A. Those were attached to the letter.

Q. Also sent to you by New York?

A. That's right.

Q. For you to send to Louisiana?

A. Yes.

Mr. Stone:

No further questions.

Mr. Suthon:

This witness will also be needed in the Seagram case.

Mr. Stone:

Did he make them on the same date?

The Witness:

I mailed all of them on the same date.

By Mr. Suthon:

Q. Then as I understand it, as far as your mailing of this literature in New Orleans to Schwegmann Brothers, you would give the same testimony as you gave to the Calvert mailing? That is Mr. Stone's question as well as mine. It would apply also to similar literature of Seagram?

A. Yes, Sir.

Mr. Stone:

Except he may have talked to some other person than Mr. Isaacson.

Q. Was your conversation with the same person?

A. Yes, Sir.

• • • • •

DECREE GRANTING PRELIMINARY INJUNCTION.

United States District Court Eastern District of
Louisiana, New Orleans Division.

Calvert Distillers Corporation,
versus Civil Action No. 2607
Schwegmann Brothers et al.

Filed December 20th, 1949.

This cause having been heard, submitted and taken under advisement on the motion of plaintiff for a preliminary injunction, and on the defenses to the demand for a preliminary injunction presented by defendants in their motion to dismiss and in their answer, and the Court having taken time to consider, and the law and the evidence being in favor of plaintiff and against defendants:

It is Ordered, Adjudged and Decreed, That the motion to dismiss of defendants be denied.

It is Further Ordered, Adjudged and Decreed, That the motion for a preliminary injunction herein be and the same is hereby granted and, accordingly, that upon the filing of a bond in this cause in the sum of \$1,000.00. the said defendants, the partnership of Schwegmann Brothers, and the individual partners therein, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and each of them, their officers, agents, servants and employees, and all persons acting in aid of or in conjunction with them, or any of them, be and they are hereby enjoined and

restrained, pending the final hearing or sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale or offering for sale or selling any of the products or commodities of plaintiff, Calvert Distillers Corporation, which bear, or the labels or containers of which bear, the trade-marks or name of plaintiff, which defendants now have or which they may hereafter acquire, at prices less than the minimum prices shown for each of said products in the minimum price schedule of plaintiff dated November 14, 1949, and annexed to the complaint herein as Exhibit "B", which products and the respective minimum prices scheduled therefor are as follows:

"Brand	Minimum Consumer Retail Price				
	Half-Gallon	Quart	Fifth	Pint	Half-Pint
"Lord Calvert Blended Whiskey	\$12.01	\$6.06	\$4.88	\$3.08	\$1.57
"Calvert Reserve Blended Whiskey	10.41	5.26	4.24	2.68	1.37
"Calvert Special Blended Whiskey			3.78	2.38	1.21
"Carstairs White Seal Blended Whiskey	9.34	4.72	3.81	2.41	1.23
"Calvert Distilled London Dry Gin		4.26	3.45	2.18	1.12

"The prices established above for each brand and size apply to all alcoholic beverages in the particular size which are sold under that brand name, regardless of differences, if any, in class, type, formula, proof, etc.

"The said prices include all Federal, State and City taxes except State and City sales taxes. These prices are applicable to all sales to consumers in the City of New Orleans and are not applicable outside the City of New Orleans."

as amended by the minimum price schedule issued by plaintiff under date of December 1, 1949, effective December 6, 1949, so as to incorporate in said minimum price-schedules the following:

"A discount of not to exceed 10% is authorized on full case sales."

or at prices less than those which may be shown in any future minimum price schedule hereafter issued by plaintiff under and pursuant to its contracts with retailers, entered into in conformity with the Louisiana Fair Trade Act, and from making any rebates, refunds, discounts or concessions of any kind or character to purchasers in connection with the purchase of, or which will aid in decreasing the selling of said products or commodities below said minimum selling prices, save and except only in those cases wherein defendants are (a) closing out their stock for the purpose of discontinuing delivering any of such commodities, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court.

It Is Further Ordered, Adjudged And Decreed, That this injunctive decree shall apply only to such commodities bearing the trade-marks and name of plain-

tiff as defendants have acquired since November 15, 1949, and as defendants shall hereafter acquire.

Thus Done And Entered at New Orleans, Louisiana, on the 20th day of December, 1949.

(S.) J. SKELLY WRIGHT,
United States District Judge.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
UPON MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION.**

Filed: January 10, 1950.

(Number & Title Omitted.)

The Court hereby makes the following Findings of Fact upon the verified complaint, the exhibits attached thereto, the affidavits offered and filed in support of the motion for a preliminary injunction, and the evidence offered by both parties on the trial of the motion.

Findings of Fact.

1. Plaintiff is a Maryland corporation and for jurisdictional purposes a citizen of the State of Maryland. Defendants are a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, all residents of New Orleans, Louisiana, and all defendants are for jurisdictional purposes citizens of the State of Louisiana. The matter in controversy herein exceeds, exclusive of in-

terest and costs; the sum or value of Three Thousand (\$3,000.00) Dollars.

2. Plaintiff sells and distributes to wholesalers and, for some years past, has sold and distributed to wholesalers on a large scale certain commodities (gin and whiskey) which bear the trade-marks owned by its parent company, The Calvert Distilling Company, and the latter's affiliate, Carstairs Bros. Distilling Co., Inc. Plaintiff's parent corporation and plaintiff's parent's affiliate, the owners of these trade-marks, have specifically authorized plaintiff to establish and to enforce in Louisiana minimum retail prices for their trade-marked beverages. These commodities bearing the trade-marks, as herein set forth, are and have been sold on a large sale by retailers to consumers in the City of New Orleans and elsewhere in the State of Louisiana and throughout the United States. The good will attached to these commodities bearing the trade-marks owned by plaintiff's parent corporation and its affiliate and the demand therefor among the distributing trade and the consuming public are and have been of substantial value to plaintiff's parent corporation and its affiliate throughout the United States, in the City of New Orleans, and elsewhere in the State of Louisiana. Plaintiff's rights, as the sole distributor for these products in the State of Louisiana and in the City of New Orleans, are well worth substantially in excess of Three Thousand (3,000.00) Dollars. The commodities bearing the trade-marks of plaintiff's parent corporation and its affiliate are and have been in free, fair, and open competition with other commodities of the same general class produced by others throughout the United

States, in the City of New Orleans, and elsewhere in the State of Louisiana.

3. The Calvert Distilling Company is a Maryland corporation which manufactures "Lord Calvert", "Calvert Reserve", and "Calvert Special" blended whiskeys, and "Calvert Distilled London Dry Gin". Carstairs Bros. Distilling Co., Inc., and affiliate of The Calvert Distilling Company, is a Maryland corporation which manufactures "Carstairs White Seal" blended whiskey. None of these products is manufactured in Louisiana. The trade-mark "Calvert" is owned by The Calvert Distilling Company and registered in the United States Patent Office in the name of that corporation. The trade-mark "Carstairs" is owned by Carstairs Bros. Distilling Co., Inc., and registered in the United States Patent Office in the name of that corporation. Plaintiff, Calvert Distillers Corporation, is a Maryland corporation wholly owned by The Calvert Distilling Company. It is the exclusive distributor in the State of Louisiana and other states for products bearing the "Calvert" and "Carstairs" trade-marks.

4. The same marketing scheme is pursued by plaintiffs for The Calvert Distilling Company and Carstairs Bros. Distilling Co., Inc. Retail prices on the Calvert and Carstairs trade-mark bearing products are established by means of fair trade contracts substantially identical throughout the United States, executed, pursuant to local law, by the local retail dealers and plaintiff. Pursuant to authority delegated by its parent corporation, the owners of the trade-mark "Calvert", plaintiff fixes retail prices schedules for its parent's trade-marked products. Pursuant to

authority delegated by its parent's affiliate corporation, the owner of the trade-mark "Carstairs", plaintiff fixes retail price schedules for its parent's affiliate's trade-marked products. Excluding variations depending upon freight rates and local taxes the retail price for these products is uniform in those states which permit retail price maintenance on alcohol beverages. In states in which retail prices established by fair trade contracts are binding upon non-signing retail dealers, notice of the retail fair trade contract prices then is given to local dealers. In this case price schedules and notices were prepared at plaintiff's head office in New York and mailed to defendant and other retailers from Coral Gables, Florida. Authority to enforce retailer maintenance of the retail prices for plaintiff's parent's and plaintiff's affiliate's trade-marked products is vested in plaintiff.

5. Plaintiff, a distributor of Calvert and Carstairs products in Louisiana, warehouses no goods in this state. Orders are received by plaintiff in Louisiana but processed out of Louisiana; title to merchandise passes outside of Louisiana. Plaintiff does not do business with wholesalers generally but operates through "exclusive" wholesalers, who are appointed to handle its products. On occasion plaintiff's agents assist these these local wholesalers by accompanying their sales representatives in soliciting sales of the merchandise distributed by plaintiff. At various times plaintiff authorizes its exclusive wholesalers to allow discounts on the purchases by retail dealers of the products it distributes, and participates with local wholesalers in absorbing a part of the discounts thus allowed. Neither the retailer nor the exclusive wholesaler fixes the retail prices. Plaintiff's head

office in New York City determines the price schedules.

6. After the adoption of Act 13 of the Louisiana Legislature of 1936 and the Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Sta. 693, 15 USC 1, plaintiff on various dates in March to June, 1948, entered into identical written contracts with a number of retailers in State of Louisiana, including retailers in the City of New Orleans. Under the contract terms these contracts were renewed by the inaction of the parties one year from the dates of their execution. On November 11 and November 12, 1949, plaintiff entered into identical contracts with retailers in the City of New Orleans. These contracts were made with respect to the commodities sold and distributed by plaintiff and bearing the trade-marks owned by its parent company and the latter's affiliate. Copies of the form upon which all of these written contracts were entered are attached to plaintiff's complaint as "Exhibit A".

7. During the interval from June, 1948, until November 10, 1949, plaintiff made no effort to enforce the contracts entered into in March to June, 1948, and renewed in March to June, 1949. On or about July 28, 1948, the Louisiana Alcohol Beverage Control Act (La. Act 360 of 1948) became effective. Section 24 of this statute fixed minimum prices for alcoholic beverages at all distributive levels, including the retail level. The minimum prices established for plaintiff's products were substantially the same as those established by previously executed fair trade contracts. Efforts to enforce these prices were made by the Louisiana Board of Alcoholic Beverage Control under

Act 360 of 1948 from July 28, 1948, until November 7, 1949. On this latter date, the Louisiana Supreme Court held invalid the price fixing provisions of the Alcoholic Beverage Control Act. The contracts entered into in November, 1949, are still in force and effect. It is unnecessary to determine whether the 1948 contracts and the renewals thereof are in full force and effect.

8. Plaintiff on or about November 14, 1949, established a new schedule of minimum prices under its contracts in the form of "Exhibit A" attached to the complaint, which new schedule of minimum prices was in the form of "Exhibit B" attached to the complaint and was effective November 14, 1949. This new schedule of minimum prices was promptly notified to the trade generally and to the other parties to the contracts with plaintiff in the form of "Exhibit A" attached to the complaint through the mailing of copies thereof by plaintiff to such parties. This schedule of minimum prices in the form of "Exhibit B", attached to the complaint, is the schedule of minimum prices in force between plaintiff and other contracting parties as of the dates material to this action, under the contracts in the form of "Exhibit A" attached to the complaint. These schedules of minimum prices were modified effective December 6, 1949, by an amendment allowing a discount not to exceed 10% on full case sales. As thus amended, these schedules constitute the schedule of minimum prices concurrently in force between plaintiff and other contracting parties under the contracts in the form of Exhibit A annexed to the complaint.

9. Defendants have never entered into any contract with plaintiff in the form of "Exhibit A" attached to the complaint, nor have they entered into any similar contract with plaintiff.

10. Defendants, with full knowledge of the contracts between plaintiff and other retailers in the City of New Orleans and elsewhere in the State of Louisiana in the form of "Exhibit A" attached to the complaint, and with full knowledge of the minimum price schedules set forth in "Exhibit B" attached to the complaint, on various occasions have offered for sale and sold at retail in their place of business in the City of New Orleans, State of Louisiana, commodities bearing the trade-marks owned by plaintiff's parent corporation and its affiliate at various prices below the minimum prices specified in said minimum price schedules in force at the time of such sales by defendants. Defendants will continue such selling activities unless enjoined and restrained therefrom.

11. Plaintiff has filed in this Court several other suits of a similar nature against other retailers, and has also made, or caused to be made, extra-judicial efforts to persuade other retailers to desist from offering, advertising, and selling the commodities bearing its trade-marks and name at retail at prices less than those set forth in "Exhibit B". Plaintiff has not discriminated against defendants in the enforcement of the rights of plaintiff asserted by this suit, and has used due diligence in efforts to enforce those rights generally.

12. Defendants had on hand unsold residue of certain previously-purchased commodities bearing the

trade-marks and name of plaintiff, at the time when defendants received notice of plaintiff's schedule of minimum prices of November 14, 1949, as set out in "Exhibit B". The Court approximates the date upon which defendants received that notice as November 15, 1949, for the purposes of limiting the application of the injunctive relief sought by plaintiff to commodities acquired by defendants after the date of receipt of such notice.

Conclusions of Law.

The Court hereby enters the following Conclusions of Law:

1. The selling activities of defendants described in Findings of Fact No. 10 constitute unfair competition, violative of the legal rights of plaintiff, and are actionable by plaintiff; La. Act 13 of 1936; 15 USCA 1; Pepsodent Co. v. Krauss Company, Ltd., International Cellucotton Products Company v. Krauss Company, Ltd., 200 La. 959, 9 So. 2d. 303 Old Dearborn Distributing Co., v. Seagrams-Distillers Corp., 299 U. S. 183, 57 S. Ct. 139, 81 L. Ed. 108, 106 A. L. R. 1476; Mennen Co. and Bristol-Meyers Co. v. Krauss Co., Ltd., 134 F. 2d. 348 (CCA 5, La.); Pepsodent Co. v. Krauss Co., Ltd., 56 F. Supp. 922 (D. C. La.)

2. Defendants have attempted to show that plaintiff's actions in fixing prices constitute a restraint of trade between the states. No findings on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act. Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 USCA 1; Pepsodent Co. v. Krauss Co., Ltd., 56 F. Supp. 922 (D. C. La.)

3. Plaintiff has no adequate remedy at law and is therefore entitled to injunctive relief.

4. A preliminary injunction should be issued herein as prayed for by plaintiff, to apply only to such commodities bearing the trade-marks and name of plaintiff as defendants have acquired since November 15, 1949, and as defendants shall hereafter acquire.

(S.) J. SKELLY WRIGHT,
United States District Judge.

New Orleans, Louisiana,
January 10, 1950.

**NOTICE OF APPEAL TO COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

United States District Court Eastern District of
Louisiana, New Orleans Division.

Calvert Distillers Corporation,
versus Civil Action No. 2607
Schwegmann Brothers et al.

Filed: January 17, 1950.

To The Honorable, The United States District Court
For The Eastern District Of Louisiana, New
Orleans Division:

Notice is hereby given that Schwegmann Brothers,
John Schwegmann, Jr., Paul Schwegmann, and Wil-
fred I. Meyer, defendants above named, hereby ap-

peal to the Court of Appeals for the Fifth Circuit from the judgment and decree granting a preliminary injunction entered in this action on December 21, 1949.

WISDOM AND STONE,
JOHN MINOR WISDOM
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendant.

312 Whitney Building,
New Orleans, Louisiana.

JOHN MINOR WISDOM.

STIPULATION OF RECORD ON APPEAL.

Filed: 3/16/50.

(Number & Title Omitted.)

It is hereby stipulated by and between Calvert Distillers Corporation, plaintiff and appellee, and Schwegmann Brothers, John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, defendants and appellants in the above entitled cause, by and through their respective attorneys, that the following parts of the record, proceedings, and evidence in this cause are hereby designated to be included and shall be included in and constitute the record on appeal in this cause:

- (1) Bill of Complaint;
- (2) Fair trade contract form (Exhibit A), annexed to complaint;

(3) Affidavit of Henry W. McGuire, annexed to complaint;

(4) Motion to dismiss;

(5) Answer to complaint;

(6) Findings of fact and conclusions of law;

(7) Decree granting a preliminary injunction;

(8) Decree of Appeal;

(9) Order extending time to file record in the Court of Appeals;

(10) This stipulation;

(11) Appellants' statement of the points upon which they intend to rely;

(12) The following portions of the official Court reporter's transcript of the evidence in these proceedings:

Page	Includes Lines
1.....	1-20
6.....	1-22
9.....	1-14
10.....	5-8; 20-25
11.....	Entire page
12.....	Entire page
13.....	Entire page
14.....	1-12; 18-25
15.....	1-20

Page	Includes Lines
16.....	5-25
17.....	1-18
18.....	2-10; 24-25
19.....	Entire page
20.....	Entire page
21.....	Entire page
22.....	Entire page
23.....	1-6
24.....	Entire page
25.....	1-5
27.....	8-25
29.....	Entire page
30.....	Entire page
31.....	1-7; 19-25
32.....	1-23
33.....	9-25
34.....	Entire page
35.....	1-21
37.....	4-25
38.....	Entire page
39.....	1-3; 6-23
40.....	8-25
41.....	Entire page
42.....	Entire page
42A.....	Entire page
43.....	Entire page
44.....	Entire page
45.....	Entire page
46.....	Entire page
47.....	Entire page
48.....	Entire page
49.....	Entire page
50.....	1-8; 13-25
51.....	1-7; 18-25

Page	Includes Lines
52.....	Entire page
53.....	Entire page
54.....	Entire page
55.....	1-7
57.....	14-25
58.....	1-14
62.....	2-25
63.....	Entire page
64.....	Entire page
65.....	Entire page
66.....	1-4
68A.....	Entire page
69.....	1-15
70.....	13-25,
71.....	1-10; 10-25
72.....	1-18
73.....	22-25
74.....	Entire page
75.....	Entire page
76.....	1-11
79.....	1-11
80.....	2-13
81.....	13-25
82.....	Entire page
83.....	1-8
84.....	15-25
85.....	Entire page
86.....	Entire page
87.....	Entire page
88.....	Entire page
89.....	Entire page
90.....	1-7
91.....	Entire page
92.....	Entire page

Page	Includes Lines
93.....	Entire page
94.....	Entire page
95.....	Entire page
96.....	Entire page
97.....	1-6

(S.) JOHN MINOR WISDOM,
 (John Minor Wisdom),
 Attorney for Defendants-
 Appellants.

312 Whitney Building,
 New Orleans, Louisiana.

(S.) MONROE & LEMANN,
 (Monroe and Lemann),
 Solicitors for Plaintiff- Ap-
 pellee.

1424 Whitney Building,
 New Orleans, Louisiana.

STATEMENTS OF POINTS.

Filed: 3/16/50.

(Number & Title Omitted.)

Defendants-Appellants intend to rely on the following points in their appeal to the Court of Appeals for the Fifth Circuit:—

I.

The Court erred in holding that the Miller Tydings Amendment to the Sherman Anti-Trust Act permits price fixing in an interstate transaction as to one not a party to a fair trade contract.

II.

The Court erred in not dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted. The Court should have dismissed the complaint on the ground that the fair trade contracts which constitute the basis of plaintiff's cause of action are null and void under the law of Louisiana in that the contracts lack mutuality, because plaintiff incurred no obligation hereunder; or, the alternative, if an obligation on the part of plaintiff inferentially exists, this obligation is subject to purely protestative conditions.

(S.) JOHN MINOR WISDOM,
(John Minor Wisdom),
Attorney For Defendants-
Appellants.

312 Whitney Building.

CLERK'S CERTIFICATE.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana do hereby certify that the foregoing 113 pages contain and form a full, true and complete transcript of the record, in the case entitled "Calvert-Versus-Schwegmann Brothers, Et Al." No. 2607 of the Civil Action Docket of this Court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and seal of said Court at the City of New Orleans, La., this 23rd day of March, A. D., 1950.

A. DALLAM O'BRIEN, JR.,
Clerk,

By ANDREW J. BACON,
Deputy Clerk.

(Seal)

[fol. 99] JOINT MOTION AND ORDER TO CONSOLIDATE CAUSE
FOR BRIEFING AND ARGUMENT—Filed March 30, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

SCHWEGMANN BROTHERS, ET AL., Appellants,

VS.

SEAGRAM DISTILLERS CORPORATION, Appellee

JOINT MOTION TO FIX CAUSE FOR ARGUMENT

To the Honorable the United States Court of Appeals for
the Fifth Circuit:

The appellants and the appellee, appearing herein by and through their respective attorneys, move the Court to assign this cause for oral argument on some date prior to the date of adjournment of the Court for the present term, and to consolidate this cause, for purposes of oral argument, with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants vs. Seagram Distillers Corporation, Appellee, No. 13-163 of the docket of this Court, for the following reasons:

(1) This cause is a preference cause, involving a question of appellee's right to injunctive relief against appellants; the preliminary injunction granted by the District Court herein is now in full force and effect and binding upon appellants;

(2) This cause involves substantially the same questions of law as are involved in the cause now pending before this Court, entitled Schwegmann Brothers, et al., vs. Seagram Distillers Corporation, No. 13-163, in which cause the parties have filed contemporaneously with this motion a similar motion, praying that both causes may be consolidated for purposes of oral argument before this Court at the same time;

[fol. 100] (3) All parties desire that this matter be disposed of as expeditiously as possible and, to the end of dividing the time for preparing briefs equitably between them and also having both briefs served at least five days before the argument date, they hereby agree, subject to the approval of the Court, that appellants' brief shall be

delivered to the appellee by a date halfway between the date of notice of completion of the printing of the record and the date five days before the argument date, and appellee's brief shall be delivered to appellants five days before the argument date.

(4) The successor to the commercial partnership, one of the appellants herein, is now a party defendant in three causes presently pending in the District Court of the United States for the Eastern District of Louisiana, in which causes questions of law substantially similar to those involved herein must be argued and decided; decision in the instant cause may be of controlling authority in these causes now pending in the District Court;

Wherefore, appellants and appellee pray that this cause may be assigned and fixed for oral argument at New Orleans, Louisiana for some date before the adjournment of this Court for the present term; that their agreement, relative to division of the time available for preparing briefs be approved, and that this cause be consolidated for purpose of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Seagram Distillers Corporation, Appellee, No. 13-163 of the docket of this Court.

/s/ Wisdom & Stone, Paul O. H. Pigman, Wisdom and Stone, 312 Whitney Building, New Orleans, Louisiana, /s/ Monroe & Lemann, Walter J. Suthon, Jr., Monroe and Lemann, 1424 Whitney Building, New Orleans, Louisiana.

[fol. 101]

Order

Considering the foregoing motion,

Let this cause be and it is hereby assigned and fixed for oral argument before this Court at New Orleans, Louisiana on the 7th day of June, 1950, appellants' brief to be delivered to appellee by the date halfway between the date of notice of completion of the printing of the record and the date five days before the argument and appellee's brief to be delivered to appellants five days before the argument date.

Let this cause be consolidated for purposes of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Sea-

gram Distillers Corporation, Appellee, No. 13-163 of the docket of this Court.
New Orleans, Louisiana.
March 30, 1950.

/s/ Wayne G. Borah, Judge.

[fol. 102] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

No. 13162

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 7, 1950.

SCHWEGMANN BROTHERS, ET AL.

versus

CALVERT DISTILLERS CORPORATION

On this day this cause was called, and after argument by John Minor Wisdom, Esq., for Appellants and Walter J. Suthon, Jr., Esq., for Appellee, was submitted to the Court.

[fol. 103] OPINION OF THE COURT FILED—July 27, 1950

IN THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH
CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellee

and

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM DISTILLERS CORPORATION, Appellee.

Appeals from the United States District Court for the
Eastern District of Louisiana

(July 27, 1950)

Before HUTCHESON, Chief Judge, and McCORD and RUSSELL,
Circuit Judges.

HUTCHESON, Chief Judge: Based on diversity and amount, these two suits, brought under Sec. 2 of Act No. 13 of 1936, La. R. S. 51:391-396, the Louisiana Fair Trade [fol. 104] Act,¹ were for injunctions, preliminary and permanent.

Defendants appeared by answers and motions to dismiss, and, the applications for preliminary injunctions

¹“Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.”

coming on for hearing, there were findings of fact and conclusions of law in plaintiffs' favor, and a decree in each suit granting the preliminary injunction as prayed.

The defendant in each suit appealing, the two appeals were set and heard together, and now stand for disposition on appellants' two contentions.

One of these is that the so-called resale price maintenance contracts between plaintiffs and other retailers than defendants, on which enforcement of the fair trade act against the non-signing defendants is based, are null and void under the laws of Louisiana for want of mutuality or because of potestativity.

The second is that the scope of the resale price maintenance permitted (when valid under state law) by the Miller-Tydings Amendment² to the Sherman Act,³ relied on by plaintiffs to save their price fixing activities from the Sherman Act does not extend to resale price maintenance against defendants, non-contracting retailers.

Appellees vigorously dispute the correctness of both of these contentions, and, by way of preliminary counter-attack, contrary to the position taken in their pleadings [fol. 105] and on the trial, assert that the sales sought to be enjoined were wholly intrastate sales, therefore beyond the reach of the Sherman Act.

They admit: that each plaintiff operates on a nation wide scope and functions in interstate commerce; that each uses the mails interstate and functions in some respects from headquarters in New York in formulating the minimum price schedules under the fair trade contracts with various retailers in the several states having such statutes and in giving notice of these contracts and price schedules to all retailers in the state; and that the liquors which each plaintiff sells to Louisiana wholesalers are shipped in interstate commerce from points outside Louisiana to the purchaser in Louisiana following such sales.

² Act of Aug. 17, 1937. See Ch. 690, Title VIII, 50 Stat. 693, 15 U.S.C., Sec. 1.

³ Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U.S.C. Secs. 1-7.

They insist, however: that the reselling activities regulated by the injunctions herein represent the second intrastate transaction in the sequence of events following the movement of these liquors into Louisiana in interstate commerce pursuant to sales made by the distributors to Louisiana wholesalers; that these wholesalers then sell intrastate to retailers; and that these in turn sell intrastate to their customers.

Appellants, on their part, point to the facts: that plaintiffs have expressly invoked the Miller-Tydings Act; that they have expressly alleged a plan of general interstate operation and activity, in control of price and restraint of trade; that they have tried the case below on the theory that interstate commerce was affected; and that they have, without distinction between interstate and intrastate sales, sought and obtained an injunction whose purpose and effect is to maintain the pattern of restraints on commerce between the states which the plan was designed to, and does, make effective.

Citing in their support *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, and *United States v. Frankfort Distilleries*, 324 U.S., 293, they urge upon us that appellees in thus focusing here on the particular sales made by appellants, have not only abandoned the theory on which the suit was brought and tried but have completely missed the point of decision in the *Miles* case, *supra*, at p. 400:

"That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with 'most of the jobbers and wholesale druggists and a majority of the retail druggists of the country' and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear. *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211; *Bement v. Natl. Harrow Co.*, 186 U.S. p. 92; *Montague & Co. v. Lowry*, 193 U.S. 38; *Swift & Co. v. U. S.*, 196 U.S. 375."

We agree with appellants that though the sales made by appellants were made intrastate, the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of congress over it as to bring plaintiffs'

activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them.⁴

This brush fighting, of appellees' making, attended to and out of the way, there remains in the way of our reach- [fol. 107] ing the real battleground of the case, the scope of the Miller-Tydings Amendment, only the equally thin skirmish line which appellants have thrown out in support of their contention that the so-called "Fair Trade Contracts" relied on to support the action are not contracts within the meaning of the Louisiana Fair Trade Act and the Miller-Tydings Amendment.

In our opinion, this position is as little tenable, is as easily turned and taken, as was the line behind which appellees fought their delaying action. In the first place, if we could agree with appellants' characterization⁵ of these contracts, we could not agree with their conclusion that they would be insufficient to support the statutory action here brought. For it is perfectly plain that whatever the legal and binding effect upon the parties of "these fair trade contracts", it is with "these fair trade contracts"

⁴ *Atlantic Co. v. Citizens Ice & Cold Storage Co.*, 178 F (2) 453; *Dr. Miles Medical Co. v. Park, U. S. v. Frankfort*, *supra*.

⁵ " 'Contract' is purely a courtesy title when it is applied to a so-called 'fair trade contract'. The word has about the same relation to contracts (as the law knows contracts) as the term 'fair trade' has to fair trade in which retail competition is eliminated. In the advertising slogan 'fair trade contract', 'contract' is a counter word used to convey the impression of a long-accepted, honorable, sacrosanct legal institution—the Mutual Agreement." * * *

"Although these are statutory actions brought against non-signing retailers, the actions are premised upon the existence of a fair trade contract. In support of their action, appellees annexed to each complaint a contract typical of all contracts executed by each appellee. The same form is used by both appellees. The contracts—which undoubtedly were drawn in New York and not by the able Louisiana attorneys for the appellees—are set forth in full in the transcripts."

the statutes in question deal, it is to give effect to "these fair trade contracts" that these statutes were drawn.

But, if we could agree that, in using the word "contract", the statutes meant to, and do, deal only with contracts which are enforceable between the parties, we think the points appellants make against the contracts in question here are strained and without substance, and that they [fol. 108] will not stand up in the light of the modern decisional tendency in Louisiana and elsewhere. This tendency is against too readily lending the aid of courts to defeat contracts on grounds of want of mutuality⁶ or the presence of a potestative condition.⁷ When, therefore, escape from an obligation is sought on these grounds, it is now settled law that courts will, where reasonably possible to do so, find a contract definite and enforceable.

Coming at last to the main battle ground, whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case, we find both appellants and appellees, instead of coming and sticking to this point, each setting up and completely outfitting a straw man of his own, the legislative history of the act as he claims it to be, and each furiously laying about to knock the other's straw man down.

It is not for one who asserts rights under a state statute to prove as a condition precedent to its enforcement that the legislature had the right to enact it. He may stand upon the presumption of validity until such presumption is overthrown. This is especially so in this case since it is admitted, as indeed it must be, that unless it is prohibited by federal law, the Louisiana Fair Trade law has been

⁶ *Geo. W. Armstrong v. So. Pro. Co.*, 5 Cir. (5-26-50), and cases cited; *Port Chester v. Miller*, 1 N.Y.S. (2) 802; 281 N.Y. 101; 22 N.E. (2) 253; *Calvert Dist. v. Nussbaum*, 2 N.Y.S. (2) 320; *Hutzler Bros. v. Remington*, 46 Atl (2) 101; *Shreveport Tractor v. Mulhaubt*, 48 So. 144; *Grace v. Arnaud's*, 121 So. 359; *Houbigant Sales v. Woods*, 196 Atl. 683.

⁷ La. Civ. Code, Arts. 2024; 2034; 2035; *Humble v. Guillery*, 33 So (2) 182; *Cockburn v. O'Meara*, 141 F (2) 779; *Conques v. Andrus*, 162 La. 73; 110 So. 93.

already determined to be a valid law of the state of Louisiana⁸ binding on consenters and non-consenters alike as a declaration of state fair trade policy which the state is competent to make.

It is admitted, too, that it has been held in *Old Dearborn Distill. Co. v. Seagrams Distill. Corp.*, 299 U.S. 183, that state statutes of this character do not violate any provision of the Constitution of the United States, though a fair trade agreement "constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act".

In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states.

In insisting, therefore, that the Miller-Tydings Amendment is ineffective to remove the prohibitions of the Sherman Act, as to non-signers, because it in terms refers to, and deals merely with, *price maintenance contracts which are valid by state law*, and does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly-misconceive the issue.

[fol. 110] Likewise, appellees, when they devote a great part of their brief to the history of the act to demonstrate that it was the intent of Congress to cover laws binding non-signers, equally misconceive the issues, and take on a burden which they do not have to bear.

Agreeing, then, with appellants that the act is free from ambiguity and that there is no occasion to resort, or propriety in resorting, to its legislative history to find its meaning, we yet agree with appellees that, in comprehen-

⁸ *Pepsodent Co. & International v. Krauss Co.*, 9 So (2) 303; *Mennen Co. and Bristol-Meyers v. Krauss*, 134 F (2) 348.

sively and completely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according to the law of a state*, the amendment removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike upon signers and non-signers.

This being so, it is wholly immaterial whether the Congress as a whole, or particular members of it,⁹ in enacting the Miller-Tydings Amendment, did or did not have in mind that there were state acts applying to non-signers as well as signers and, therefore, did, or did not, have in mind the specific intent that the amendment should be effective as well against non-signers as against signers.

Read on its face and interpreted in accordance with that reading, what the amendment did was to remove all Sherman Act restrictions on agreements restraining trade in states where, by the state law, these agreements had been validated as to intrastate commerce. Thus a non-signer finding himself pursued under a fair trade act and without remedy as to intrastate transactions, is bound by the terms and wording of the amendment to find himself equally with-
[fol. 111] out remedy as to interstate transactions. For when he invokes the Sherman Act to prevent the enforcement against him of the state law, he is referred to the Miller-Tydings Amendment of it with the inquiry, "What are you complaining of, the agreements which establish a fair price?" and the answer, "The Sherman Act as amended now validates them." If the non-signer answers, "No, I am not complaining of the agreements. I am complaining of the act of the state, which, though I did not sign them, requires me to respect those agreements, whereas the amendment of the Sherman Act, to which you refer, did not refer to, or authorize, state action against non-signers." "Sorry", replies the Sherman Act, "but the amendment neither authorizes nor prohibits state legislation. The control it exercises is not over, the effect it has is not upon, legislation by the states. It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce. The amendment, re-

⁹ Cf. *Fleming v. A. H. Belo Corp.*, 121 Fed (2) at p. 212-213.

moving from the prohibition of that act 'contracts or agreements prescribing minimum prices for the resale of a commodity' * * * "when contracts or agreement- of that description are lawful as applied to intrastate transactions under any state law, was enacted to, it did remove the Sherman Act as an obstacle in the way of completely effective state action, and there is nothing, therefore, that the Sherman Act can do for you."

Whatever then may be our views as to the unwisdom of the policy lying back of fair trade acts and the Miller-Tydings amendment, we are in no doubt that the judgment was right, and must be affirmed.

[fol. 112] RUSSELL, Circuit Judge, dissenting:

As to two of the underlying questions which should control the disposition of this case, we are all in agreement. That is that the transactions were so much in interstate commerce as to be subject to the exercise of Congressional power in the regulation thereof and, also, that the provisions of the Miller-Tydings Amendment, relaxing the regulations in protection of interstate commerce evidenced by the Sherman Act,¹ are so clear as to render improper resort to the legislative history of that Amendment in applying its terms.² The sole point of difference between us therefore is the effect which should be given this amendment when read in the light of its unambiguous language.

It seems clear to me that the majority opinion enlarges and extends the provisions of the statute to a scope not justified by the legislative language. I can not agree that the amendment, merely by excepting from the prohibition of the otherwise illegal "contracts and agreements" forbidden by the Sherman Act, "contracts and agreements prescribing minimum prices * * * when *contracts or agreements* (italics supplied) of that description are lawful as applied to intrastate transactions" under the State law,

¹ 16 U. S. C. A. §1-7.

² *Caminetti v. U. S.*, 242 U.S. 470; *Gemsco v. Walling*, 324 U.S. 244; *Ex Parte Collette*, 337 U.S. 55. *C. F. Sturges v. Crowningshield*, 15 U. S. C. A. §1-7.

likewise embraces within its exemption the provisions of any State *statute*, and this notwithstanding the only reference to such statute is that which might validate the "contracts and agreements." It may be further observed at this point, that the Miller-Tydings Amendment in no way sought to remove the prohibition against a "combination in the form of trust or otherwise, or conspiracy, in re-[fol. 113] straint of trade or commerce among the several States."

The nature and purpose of the statute amended,—the Sherman Act,—requires that any amendment thereto which in anywise relaxes the statutory declaration of public policy should be strictly construed. As has been said, "the legislative purpose set forth in the general enactment expresses the legislative policy and only those subjects expressly exempted by the proviso should be freed from the operation of the statute."³ Indeed, upon any basis, (except possibly from applying the statute, not as enacted, but upon conjecture which might arise from some features of its legislative history), it is difficult to perceive any basis for enlarging the plain meaning of its language. But we are all agreed that there is no occasion here for consideration of the legislative history of the Amendment, and therefore whatever may have been the intention of its sponsors, we are controlled by the amendment as actually enacted. The amendment deals only with "contracts and agreements" and in the absence of any enlarging provision, furnishes no basis for incorporating as an exemption from the Sherman Act any provision of a State Statute which restrains interstate commerce by provisions applicable to those who have not made the "contracts and agreements." My position is illustrated by the observation that the Miller-Tydings Amendment goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions (*Dr. Miles Medical Co. v. Park and Sons Co.*, 220 U.S. 373) as is removed by section 1 of the Louisiana Act now in question as to intrastate transactions. Section 1 of the Louisiana Act relates, as likewise does the Federal Act, only to establishing the legality of the *contracts* in question. That far, the two statutes are in

³ Sutherland on Statutory Construction, 3rd Ed. 1943, §4933; *U. S. v. Dickson*, 40 U.S. 141, 163.

pari materia. Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement. I believe it may not be successfully contended that without section 2, the provisions of section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by section 1. The terms of the Federal Amendment no more embrace section 2 of the Louisiana Act than does section 1 of that Act. Thus Congress has legalized the *contract* validated by the State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law.

It is not material whether the defense be declared predicated upon the lack of State power, or upon the ground that the enforcement of a State statute will result in a Federal Court of Equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. The result properly to be reached is the same, for the Federal Court must not require action which countenances conduct contrary to Federal law. In the present case, the Court could enforce section 1 of the Louisiana Act, but could not enforce that part of section 2 relating to non-contractors if, under the circumstances, such enforcement would be contrary to the Sherman Act. It is [fol. 115] recognized that in this time when the weight of interstate commerce affects multitudinous transactions, the construction here given the Miller-Tydings Amendment greatly circumscribes the relaxation of Federal control in the enforcement of State Fair Trade Acts. However, we should apply the statute as written. This construction removes the legal difficulty to the enforcement of permissive contracts, themselves declared illegal in *Dr. Miles Medical Co. v. Park and Sons Co.*, *supra*, and likewise makes it clear that the provision of the Amendment that the making of such contracts shall not be an unfair method of competition, removes further infirmity theretofore found inherent in such contracts. *Federal Trade Commission v. Beech-*

Niel Packing Co., 277 U.S. 441. If the Congress determines it wise to further relax the prohibitions of the Sherman Act, it can very easily do so by merely excepting from its operation all provisions of State Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction.

It is also clear that as to those who have not executed contracts or agreements validated by the Amendment, there may be combinations or conspiracies in illegal restraint of trade which have a basis over and beyond that afforded by the execution of contracts and agreements as such. If so, such contracts being legally permitted, of course would not themselves evidence any illegality of agreement, but neither would they raise a sanctuary for those who, though parties to legal contracts, might illegally combine or agree to restrain interstate commerce so far as non-contractors are concerned. This was recognized by the parties and the trial Court. That Court, being of the opinion that the Miller-Tydings Amendment, construed in the light of its [fol. 116] legislative history, in effect adopted the State Fair Trade Statute (as do my colleagues, but without resort to legislative history), expressly found as a conclusion of law, "defendants have attempted to show that plaintiff's actions in fixing retail prices constitute a restraint of trade between the states. No finding on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act." For the reasons I have stated, I do not accept this view. The proper disposition of this case would require us to adjudge that the Court was in error in holding that the Amendment removed the protection of the Sherman Act from non-contractors. He should have considered and adjudged the defendants' contention that, as to them, non-contractors, the plaintiffs' conduct constituted an illegal restraint of commerce between the states, at the same time giving to the plaintiffs the benefit of the Amendment so far as applicable to parties entering into the permitted price maintenance contracts. We should not evaluate the facts, which must be done in order to apply the law, in the first instance. I would reverse the judgment of the trial Court with direction that the case be thus heard and concluded.

[fol. 117]

JUDGMENT

Extract from the Minutes of July 27, 1950.

No. 13162

SCHWEGMANN BROTHERS, ET AL.,

versus

CALVERT DISTILLERS CORPORATION

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Schwegmann Brothers, and Others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

“RUSSELL Circuit Judge, dissents.”

[fol. 118] PETITION FOR REHEARING FILED—August 10, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellees

CONSOLIDATED WITH

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM-DISTILLERS CORPORATION, Appellees

PETITION FOR A REHEARING

Appellants in the above styled causes represent that they are aggrieved by the majority opinion filed July 27, 1950, and petition this Honorable Court to grant a rehearing on the following grounds:

[fol. 119]

I.

Respectfully and with all due deference, appellants submit that the majority of this Honorable Court misconceived the principal issue of this litigation. The issue, as counsel see it, is not the effectiveness of the Miller-Tydings Amendment to relieve from the prohibitions of the Sherman Act resale price maintenance by *contract*. Rather, the issue is the effectiveness of the Amendment with respect to resale price maintenance over and beyond contracts—*against non-contracting parties*.

II.

In the trial of this case, in the argument before the District Court, in the briefs and in the argument before this Honorable Court, counsel for appellants and counsel for appellees did not differ as to what constitute the issues in this litigation. Counsel for appellants and apparently counsel for appellees had no notion that this Honorable

Court would regard as the principal issue before it the question: "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act resale price maintenance contracts". Prior to the filing of the majority opinion, this conception of the issue was expressed only by the Presiding Judge, briefly, without exposition, and then only in the course of the closing argument of counsel for appellees. It is respectfully submitted, therefore, that the determination of what really constitutes the issue was not given consideration by this Honorable Court commensurate with the importance of the case.

[fol. 120]

III.

There is a basic inconsistency in the majority opinion. The opinion states that the Miller-Tydings Amendment is plain and unambiguous. But the effect of the decision is that the word "contracts" as used in the Amendment does not mean contracts. *In effect, according to the majority opinion, "contractual" includes "non-contractual"—just as if "navigable" should include "non-navigable" and "negotiable" should include "non-negotiable".* According to the majority opinion, non-contracting parties must bear the same burdens as contracting parties.

Counsel reiterate, and the Court has found, that the Amendment is plain and unambiguous. In its common meaning and in its technical legal meaning the term "contract" means an agreement, to do or to refrain from acts, between two or more persons, binding those persons and only those persons. Any other view of contracts ignores the meaning of the word and repudiates the long history of contracts distinguished from status fixed by statute.

Wherefore, petitioners pray that this Honorable Court grant a rehearing in these causes and that it adopt the minority opinion as the majority opinion of this Court.

Respectfully submitted, (signed) Paul O. H. Pigman,
Wisdom and Stone, John Minor Wisdom, Saul
Stone, Paul O. H. Pigman, Attorneys for Appel-
lants.

[fol. 121] BRIEF STATEMENT IN SUPPORT OF PETITION FOR
REHEARING

I.

Respectfully, and with all due deference, it is submitted that the majority of this Honorable Court misconceived the issue in this litigation.

The majority opinion states that "both appellants and appellees, instead of coming and sticking" to the point of the case, set up "straw men", and then each "furiously . . . [layed] about to knock the other's straw man down." The "main battleground", according to the majority opinion, was:

"whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case."

It is certainly true that appellants did not consider this an issue; nor did appellees. There has never been any doubt that the Amendment relieves resale price maintenance contracts from the Sherman Act. There has never been any dispute over the application of the Amendment to contracts, that is, the enforceability of resale price maintenance between contracting parties. The dispute is over the application of the Amendment to price-fixing over and beyond contracts, that is, the enforceability of resale price maintenance against non-contracting parties.

This case was carefully prepared by counsel for both sides. Counsel for appellees were counsel for Pepsodent [fol. 122] Company in *Pepsodent v. Krauss*, 56 F. Supp. 922 (D. C. La. 1944). Judge Borah, author of the opinion in that case and now a member of this Honorable Court, based his decision on the legislative history of the Amendment. In the instant case, the District Court relied on *Pepsodent v. Krauss*. There is a manifest reason why appellees were so anxious to go into the legislative history.¹

¹ Appellants reaffirm their position that the language of the Amendment is so clear that resort to the legislative history is improper. Appellants also reaffirm, however, that a study of the legislative history leads irresistibly to the

Appellees feared that they would be out of Court, if restricted to the plain meaning of the Amendment. They had to go beyond the statute in search of some justification for asserting that an exception,² in terms limited to contracts, includes non-contractual resale price maintenance imposed by statute on third persons not parties to the contracts. As expressed in the minority opinion:

"Indeed, upon any basis (except possibly from applying the statute, not as enacted, but upon conjecture which might arise from some features of its legislative history), *it is difficult to conceive any basis for enlarging the plain meaning of its language.*" (Italics supplied.)

[fol. 123] It is respectfully submitted that the majority of this Honorable Court erred in not recognizing as the real issue:

"Can or does an exception to the Sherman Act covering 'contracts and agreements' be extended to cover non-contractual, statutory resale price maintenance imposed on non-signers by the substantive law of the state, not by contract or agreement—in transactions affecting interstate commerce?"

conclusion that the Amendment was intended to validate resale price maintenance only against willing contracting parties. As conclusive proof one need go no further than a comparison of the Miller-Tydings Amendment and a typical Fair Trade Law. The Amendment tracks Section 1; it omits any reference to non-signers (Section 2). If one goes further, one finds that the reason for the omission of any reference to non-signers is that the Amendment substantially follows the Capper-Kelly bills introduced in Congress in 1927, 1928, and 1931—*prior to the existence of any non-signer clause in any state statute, and actually prior to the passage of any fair trade law at all.*

² It is respectfully submitted that the majority of this Honorable Court did not give sufficient weight to the principle of statutory construction that an exception to a declaration of public policy should be strictly construed.

II.

The majority opinion states that "the proponents of . . . the fullest scope for state fair trade statutes needed only the passage of a federal act relieving . . . contracts from the . . . Sherman Act". Counsel respectfully submit that this reasoning begs the question, since it rests on the assumption that the meaning of contracts may be extended to include what, for lack of a better term, may be called non-contracts. If, however, as both the majority and minority of the Court agree, the legislative language is plain and unambiguous, the proponents of fair trade legislation needed something more than an exception for "contracts and agreements". As stated in the minority opinion, they needed an exception covering provisions of a state statute "applicable to those who have not made the contracts and agreements".

The Sherman Act unquestionably is an obstacle to resale price maintenance affecting interstate commerce. The Miller-Tydings Amendment removes that obstacle with respect to parties to a resale price maintenance contract. It does not follow, however, that removal of the obstacle as [fol. 124] to contracting parties has any effect on non-contracting parties.

The first Fair Trade statutes, from 1931 to 1933, validated, in intrastate transactions, resale price maintenance contracts between the parties *but contained no non-signer clause*. These contracts were ineffective against non-contracting retailers and did not accomplish their purpose of eliminating price competition. In 1933, California added Section 2 to its Fair Trade Law, binding non-signers. Other states, including Louisiana, adopted Fair Trade laws which follow almost identically the language of the *amended* California statute. Section 2, the non-signer clause, does not validate the contracts; that was already accomplished by Section 1. Section 2 superimposes an independent statutory obligation that is outside of the legal concept of a contract. Proponents of price-fixing found it necessary to bind non-contracting parties by statute in an intrastate transaction; it is equally necessary to bind non-contracting parties by statute in an interstate transaction (for purposes of avoiding the Sherman Act).

The minority opinion makes a forceful and convincing point: it would have been simple for Congress to have excepted from the Sherman Act resale price maintenance in accordance with "all provisions of state Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction". Congress did not. The Amendment excepts only the contract clause embodied in Section 1. The Amendment tracks Section 1, word for word, but omits [fol. 125] any reference to non-signers (Section 2). As the minority opinion points out cogently:

"I believe it may not be successfully contended that without Section 2, the provisions of Section 1 could be in any wise applied to retailers, who had not seen fit to execute price maintenance contracts legalized by Section 1. The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act. Thus Congress has legalized the contract validated by the State law, but not every provision of the statute . . . We should apply the statute as written."

III.

Apparently as a peripheral predicate for its conclusion, the majority opinion makes several references to the inherent power of the states to enact Fair Trade legislation, for example:

"[It was not necessary] to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power . . . In insisting, therefore, that the Miller-Tydings Amendment is ineffective . . . as to non-signers, because it . . . does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue."

Appellants do not question a state's power to enact Fair Trade legislation, regulating intrastate transactions, against signers and non-signers. But a state's authority is limited by the commerce clause of the United States [fol. 126] Constitution, the Sherman Act and any other federal statute in the field of interstate commerce. Pro-

ponents of the legislation found it necessary to secure a federal exception covering contracts; the state's inherent powers did not protect contracts in restraint of interstate trade, regardless of the validity of such contracts under state law. For the same reason that it was necessary to except contractual resale price maintenance from the Sherman Act, it is necessary also to except non-contractual resale price maintenance independently imposed by state statute on non-signers—regardless of a state's inherent intrastate power.

IV.

With respect and deference, counsel for appellants confess an inability on their part to understand the reason for the conclusion expressed in the majority opinion.

If the majority opinion is analyzed and an effort is made to reduce it to the terms of a syllogism, one would find as a major premise that the Amendment removes Sherman Act restrictions, in transactions affecting interstate commerce, on contracts which are valid in intrastate transactions. Appellants do not dispute this premise. The stated conclusion is: since a non-signer is bound in an intrastate transaction, he is also bound in an interstate transaction. The major premise, standing alone, does not support the conclusion, for the reason that there is no necessary relationship between a fair trade contract validating resale price maintenance by the contracting parties and an independent statutory provision imposing resale price maintenance on non-contracting parties.

[fol. 127] There is no express minor premise to close the hiatus between the major premise and the conclusion. As a matter of fact, no minor premise can be formulated to support the conclusion if, as is agreed, the Amendment plainly and unambiguously refers only to "contracts or agreements".

Counsel for appellants do not contend that all reasoning must be syllogistic or that an opinion of this Honorable Court to be sound must be capable of being subjected to the formalism of a syllogism. Counsel do contend, most respectfully, that against the yardstick of a syllogism, or, as stated in the minority opinion, "upon any basis (except possibly . . . conjecture which might arise from features of its legislative history)," the majority opinion is unclear.

V.

The decision rendered in this case is a major one in American jurisprudence, one that will be studied, analyzed, and weighed by all interested in the legal aspects of restraint of trade, statutory construction, and the interplay of intrastate and interstate transactions. But its greater importance lies in the field of practical economics. The decision will have a direct effect on the merchandising methods of retailers who, like Schwegmann Brothers, by efficient operations, a volume business, and a serve-yourself system, are able to reduce their costs and pass on corresponding savings to customers. The decision will be a green light for manufacturers and distributors who have refrained from fair trading their products for fear of just such litigation as this litigation. It will have a direct effect on customers who will have to pay more for their [fol. 128] goods than the goods are worth in a free market. In normal times this would be serious enough. In the present crisis detonated by the Korean war, perhaps the first of many crises or the start of one of long duration, in a period of rapidly rising costs of living, the danger of inflation omnipresent—the seriousness of a decision broadening the scope of a statute inherently inflationary multiplies in geometric progression.

Counsel would not presume even to intimate that these effects should enter into the Court's consideration of the *merits* of this cause. Counsel do urge, earnestly and respectfully, that the inescapable economic effects of the decision underscore the urgency of appellant's petition for rehearing and warrant a reexamination of the correctness of the majority opinion.

Respectfully submitted, (signed) Paul O. H. Pigman,
Wisdom and Stone, John Minor Wisdom, Saul
Stone, Paul O. H. Pigman, Attorneys for Appel-
lants.

This is to certify that on the 9th day of August, 1950, I served personally on the attorneys for the appellee, the petition for rehearing and brief statement in support of the petition.

(signed) Paul O. H. Pigman, Attorney for Appel-
lant.

This is to certify that this petition is filed in good faith and not for purposes of delay.

(signed) Paul O. H. Pigman.

[fol. 129] ORDER DENYING REHEARING

Extract from the Minutes of September 15, 1950.

No. 13162

SCHWEGMANN BROTHERS, ET AL.,

versus

CALVERT DISTILLERS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

RUSSELL, Circuit Judge, Specially Concurring:

Since my Brethren remain firm in their original opinion, no purpose could be served by the grant of a rehearing, and I therefore concur in the order denying the same.

[fol. 130] Clerk's Certificate to foregoing transcript omitted in printing:

[fol. 131] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 442

ORDER ALLOWING CERTIORARI—Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.